REPORTS

OF

Cases in Law and Equity,

DETERMINED IN THE

SUPREME COURT

OF

THE STATE OF MISSOURI:

JEFFERSON CITY, APRIL TERM, A. D. 1877.

IN THE FIFTY-SEVENTH YEAR OF THE STATE.

PRESENT:

HON. THOMAS A. SHERWOOD, CHIEF JUSTICE.
" JOHN W. HENRY,
" WARWICK HOUGH,
" WILLIAM B. NAPTON,
" ELIJAH H. NORTON,
} JUDGES.

McCOY, APPELLANT v. ZANE.

1. **Crime:** GAMING DEVICE: STATUTE CONSTRUED. The statute (Wag. Stat. 503, §§ 24—27) authorizing the seizure and destruction upon summary process of "any prohibited gaming table or gaming device kept or used within the County" does not warrant the destruction of such property, unless it is kept or used for gaming purposes.

2. **Police Power:** SUMMARY PROCESS: JURISDICTION MUST APPEAR. A Judge's warrant for the destruction of property issued under a statute, which permits condemnation without affording the owner an opportunity for a hearing or trial, must show upon its face the existence of all the facts requisite to authorize its issue.

3. **Void Warrant:** PROTECTION OF OFFICER. Unless it appears on the face of such warrant that the property condemned was kept or used for gaming purposes, the warrant will be no protection to the officer executing it.

Appeal from Jasper Court of Common Pleas.—O. E. Brown, Judge.

Thomas & Garrison, for appellants.

Walser & Cunningham, for respondent.

Napton, J.—This was an action in the Common Pleas Court of Jasper County to recover damages from the sheriff of said county for the destruction of a Roulette wheel and table under sections 24, 25, 26 and 27 of article 8 of the statutes concerning crimes and punishments (see W. S. p. 503). The plaintiff was the owner of the Roulette table at the time of its destruction. The defendant justified under the following order of the circuit judge dated November 26, 1873:

"State of Missouri, } ss.
County of Jasper. }

It appearing to the undersigned Judge of the Circuit Court within and for the County of Jasper that, in obedience to a warrant issued on the 22d day of Nov., 1873, directed to the sheriff of said county hereto annexed, he said sheriff did in the city of Joplin, in said County, seize the following gambling devices to wit: One Faro Bank and outfit, one E. O. Roulette table and wheel and part of a Keno outfit, and the said articles being found to be gambling devices, it is therefore ordered by the undersigned Judge aforesaid, that said gambling devices be publicly destroyed by burning or otherwise, and that this order be executed by the sheriff of Jasper County, and that he make a return of this order, and that this order, the warrant and return thereon be filed in the office of the clerk of the Circuit Court of said county, and that the cost of this proceeding be certified by the sheriff to the County Court of Jasper County for payment. Given under my hand this 26th day of November, A.D., 1873.

B. L. HENDRICK,
Circuit Judge.

The following return was made on the order:

Executed the above order of Court by destroying by fire and otherwise the above described gambling devices as ordered by the Hon. B. L. Hendrick, Judge of the Circuit Court of Jasper County, Missouri, in a public place, in the City of Carthage, County of Jasper, Missouri, on the 27th day of November, A. D. 1873. J. S. ZANE,

Sheriff of Jasper Co. Mo."

Upon the trial of this case, it appeared from the defendant's statement as a witness that the Roulette wheel was packed away in a box at the time it was seized and was not then in use. The defendant did not know to whom it belonged at the time of the seizure, but before it was taken out of the room where it was stored, he was notified by the plaintiff in writing that the property was the plaintiff's and that it was not used for gambling purposes. The plaintiff on his examination said that he had owned the property sued for about three months prior to the date of its seizure, that it was stored away in the original package and was used for no purpose whatever, either by the plaintiff or any one else, that it had never been used for gaming purposes since he got it; that he took the property on a debt which was due him. The plaintiff offered to prove by other witnesses that he had lived in Joplin for more than two years, that he has a reputation as an upright citizen, that the property in question had never been used for any purpose, that ever since the plaintiff became the owner it had been packed away in a box and stored away in a room and had never been taken out of the room and box since the plaintiff owned it. This proposed evidence was rejected by the Court. The Court instructed the jury; "that although the defendant did take and destroy an E. O. Roulette table and wheel belonging to the plaintiff, yet if they believed from the evidence that the defendant took and destroyed said Roulette wheel and table as said sheriff under certain

warrants, read in evidence signed by B. L. Hendrick, Circuit Judge for Jasper County, Missouri, the jury will find the issue in favor of the defendant." Thereupon the plaintiff took a non-suit with leave to move to set it aside.

I. The provisions of the statute under which the conflagration occurred are as follows:

SECTION 24. Whenever any judge or justice of the peace shall have knowledge or shall receive satisfactory information that there is any prohibited gaming table, or gaming device kept or used within his county, it shall be his duty forthwith to issue his warrant, directed to the sheriff or any constable, to seize and bring before such judge or justice such gaming table or other device.

1. CRIME: gaming device: statute construed.

SECTION 25. If any judge or justice have knowledge, or shall be satisfactorily informed of the name or description of the keeper of any such prohibited gaming table or device, he shall, also, issue his warrant to apprehend such keeper, and bring him before such judge or justice.

SECTION 26. The officer who shall be charged with the execution of any warrant specified in either of the two last sections, shall have power if necessary, to break open doors for the purpose of executing the same, and for that purpose may summon to his aid the power of the county.

SECTION 27. It shall be the duty of every judge or justice of the peace, before whom any such prohibited gaming table or device shall be brought, to cause the same to be publicly destroyed by burning or otherwise.

II. In view of the conclusion we have reached in this case, it is unnecessary to determine the questions which have been so extensively discussed by the counsel in regard to the constitutionality of these statutory provisions. Conceding them to be within the legislative discretion in its exercise of police regulations, which we are inclined to think they are, it must be admitted they are of a very stringent character, and must

2. POLICE POWER: summary process: jurisdiction must appear.

be strictly construed. The destruction of private property without an opportunity being afforded the owner, of a hearing or trial, is to say the least an extraordinary investment of power, and can only be authorized when the health and morals or safety of the community require such legislation. Gambling devices are of infinite variety, as the decisions of our Court will show; and many of them may be kept or used for beneficial or at least harmless purposes. Ordinary cards have long since been held to be gambling devices, but it would astound the public to be advised, that a judge or justice of the peace could order a sheriff or a constable to seize all the packs of cards in the book stores and order them to be burned. The statute is intended to authorize the destruction of gambling devices, that are kept or used for gaming purposes. The 21st section of the Act explains who is to be considered as the keeper of a gambling device. That section is as follows: "Every person appearing or acting as master or mistress, or having the care, use or management, for the time, of any prohibited gaming table, bank or device, shall be deemed the keeper thereof; and every person who shall appear or act as master or mistress, or having the care, use or management of any house or building in which any gaming table, bank or device is set up or kept, or of any gaming house, brothel or bawdy house, shall be deemed to be the keeper thereof." The meaning of this section is obvious; a keeper of a gambling device is one who has the management of it, when used for gaming purposes, or when it is set up with a view to attract people to risk their money on it, and when such attractions are offered for the purposes of gain on the part of the keeper. The warrant of Judge Hendrick in this case failed to state that the gambling device brought before him was held or used for gaming purposes. This was of the essence of the offence. The jurisdiction confided to the judge was a special one, and was also entrusted to a justice of the peace, and the facts which warranted its exercise must appear in the warrant. Where no

jurisdiction appears, the order is void on its face, and furnishes no justification to the officer. It might be a question, whether a sheriff or constable, acting under the provisions of this statute, is not fully protected by a writ which on its face is regular, although the facts in the particular case did not warrant its issuance.

III. In this case there was an offer to prove facts which showed that the judge had no authority to issue the warrant. Whether such evidence should have been admitted or not is a question, upon which we give no opinion. There is no necessity for it in this case, since the judge seems not to have found, that the gambling devices ordered to be destroyed were held or used for gaming purposes. The jurisdiction of the judge depended on the establishment of these facts, and the officer cannot protect himself by an order of a judge who has no jurisdiction over the case, when the want of jurisdiction appears on the face of the warrant. Judgment reversed and cause remanded. The other Judges concur.

3 VOID WARRANT: protection of officer.

REVERSED.

MASTIN ET AL. v. THE FIRST NATIONAL BANK OF KANSAS CITY, GARNISHEE OF GRAVES, APPELLANT.

Attachment: NON-RESIDENCE: AFFIDAVIT. The affidavit for an attachment on the ground of non-residence of defendant need not allege that the demand is due. (Wag. Stat. pp. 181, 182 §§ 2. 6).

Appeal from Jackson Circuit Court.—SAMUEL L. SAWYER, Judge.

Tomlinson & Ross, for appellant.

F. M. Black, for respondents.

SHERWOOD, C. J.—The plaintiff instituted suit by attachment against the defendants Graves and others. The

ground of the attachment was non-residence. The affidavit in usual form. The First National Bank of Kansas City was garnished, and on trial of issue joined between garnishee and plaintiff, judgment went in favor of the latter. The only point presented is a jurisdictional one; the garnishee claiming that the court acquired no jurisdiction in consequence of the affidavit omitting to state that the demand was *due*. While it is true that section 2 of the attachment act prohibits the issuance of an attachment based on a demand not yet due, where the defendant is a non-resident, yet there is no statutory requirement that the affidavit shall allege the maturity of the demand. The petition in this case shows the demand was due, and this is sufficient. Section 6 of the act referred to prescribes what the affidavit shall state, and with that section the plaintiffs have complied. There is not the slightest merit in this appeal and the judgment is affirmed with ten per cent. damages. All concur.

AFFIRMED.

HAY, ADMINISTRATOR OF CRAWFORD, v. WALKER ET AL., APPELLANTS.

1. **Implied Contract:** INTENTION OF PARTIES. In order to raise an implied contract to pay for labor, it is not necessary that there shall have been an intention on the part of the laborer during his service to charge therefor; it is sufficient that the one for whom the labor is done expected to pay for it. So, unless the work was done under circumstances justifying the belief that no charge was intended, a liability arises, even though no charge was in fact intended by the laborer during his service.

2. ———: ———. In an action to recover the value of services rendered to a firm the defence relied on was an alleged understanding between the parties that plaintiff was to charge nothing for his services. The Court having instructed the jury, that, as there was no express contract, defendants were not liable if the services were

rendered under circumstances justifying their belief that no charge was intended; *Held*, no error to refuse instructions to the effect that plaintiff could not recover, if at the time the services were rendered they were understood by all the parties to be gratuitous, or if plaintiff did not then intend to charge for them. The instructions given are equivalent to those refused.

Appeal from Probate and Common Pleas Court of Greene County.—J. H. SHOW, Judge.

John P. Ellis, for appellant.

1. The question is one of intention. It is not alone sufficient that one of the parties intended to charge or that the other intended to pay; neither intent is sufficient, both are necessary and must have co-existed; there must have been a contact of intent. *Allen's Admr. v. Richmond College* 41 *Mo.* 308; *Whaley v. Peak* 49 *Mo.* 80; *Hart v. Hart's Admr.* 41 *Mo.* 441; *Morris v. Barnes' Admr.* 35 *Mo.* 412; *Guenther v. Birkicht's Admr.* 22 *Mo.* 439; *Coleman v. Roberts* 1 *Mo.* 97.

2. The instructions given were inconsistent and therefore did not correctly present the law. *Buel vs. St. Louis Transfer Co.* 45 *Mo.* 562; *Otto v. Bent* 48 *Mo.* 23.

3. The Court could not single out the particular fact of *services performed*, and ignoring all the other issues and evidence, declare as a matter of law that if the services were rendered there was no defense except payment or satisfaction. *Chappell v. Allen* 38 *Mo.* 213; *Rose v. Spies* 44 *Mo.* 20; *Myer v. Pacific R. R.* 45 *Mo.* 137.

4. Instructions are calculated to mislead, and hence erroneous, which place the case before the jury upon a portion of the facts only, and which in effect restrict the issue and exclude from the consideration of the jury questions that must be passed upon. *Mead vs. Brotherton* 30 *Mo.* 201; *Sawyer vs. Hann. & St. Jo. R. R.* 37 *Mo.* 240; *Hall v. Johnson* 57 *Mo.* 521.

John O'Day, for respondent.

NORTON, J.—This suit was brought by John A. Crawford, now deceased, in the Probate and Common Pleas Court of Green County against the defendants composing the firm of Walker & Bentley. The plaintiff in his petition alleges, that he performed services for the defendants as clerk and book-keeper for about fifteen months, and that they were reasonably worth $60 per month, and that there was a balance of $830 still due and unpaid. The answer denies the indebtedness, admits that plaintiff remained in the store of defendants the length of time charged in the petition, and alleges that it was understood and agreed that he was to charge nothing for what he did; denies that his services were worth sixty dollars per month, and alleges that he was boarded by one of the defendants, and that his board was worth more than his services, and and that plaintiff accepted $67, the amount of his account, in full satisfaction and settlement of all claims against defendants for services. The allegations of the answer were denied by replication, and on a trial plaintiff obtained verdict and judgment for $356.93, from which defendant has appealed to this Court.

I. We are asked to review the case because of alleged error committed by the Court in giving instruction No. 2 for plaintiff and refusing to give Nos. 1, 2, 3 and 4 on behalf of defendant. The instructions are as follows: No. 2. "If the jury find from the evidence that Walker told the plaintiff to go to work and take charge of the books in defendants' store in the months of February, March, April or May, 1872, and that plaintiff did go to work and take charge of the books, and the defendants or either of them stood by and saw plaintiff do said work and services, then the defendants are bound to pay plaintiff what his services are reasonably worth, and the jury will find for plaintiff that amount, unless defendants have shown to the satisfaction of the jury that they have paid or satisfied plaintiff for such services." The following instructions were refused: 1. "That al-

1. IMPLIED CONTRACT: Intention of Parties.

though it may have been Walker's intention to pay plaintiff the value of his services, still unless it was the intention of plaintiff, during his services, to charge for the same, you will find for the defendants." 2. "That although plaintiff may have performed valuable services for the defendants in their store, still if it was his understanding during such service, that he was to make no charge for his labor and that he was working without wages, he, the plaintiff, cannot, subsequent to such service, charge for or recover the real value of his labor." 3. "If the jury believe from the evidence, that during the time plaintiff was in the service of the defendants, it was the understanding of plaintiff and defendants, that the services of plaintiff to defendants were gratuitous, the plaintiff cannot recover, and you will find for defendants." 4. "In order that there be an implied contract to pay for labor, there must have been an intention on the part of the laborer, during his service, to charge therefor. And he cannot subsequent to such service, claim pay for services which he had not during such service intended to charge for."

II. It was set up as a substantive defence on the part of defendant, that it was understood and agreed that plain-
2 ——————: tiff was to charge nothing for his services during the time he remained in defendant's store, and, evidence having been given tending to show that fact, if the cause had gone to the jury upon the above instruction without some declaration of law having been given equivalent to those contained in the refused instructions the judgment would not be permitted to stand. This however was not the case, for on behalf of the defence the Court gave the following declarations embodying fully this branch of the defence relied upon:

3. While a firm may be liable for work done for them without an express contract which they saw and knew of, still they are not liable if the work was done under circumstances justifying their belief, that no charge was intended.

4. The Court instructs the jury that if they believe from the testimony that the services of plaintiff were not necessary to the carrying on of the partnership business although contracted for by defendant Walker, and that plaintiff knew this fact, they will find for defendant Bently, unless some authority is shown to have been conferred on defendant Walker by defendant Bently to so bind the firm. Under the first of the above instructions defendants had the full benefit of the defence relied upon by them, that plaintiff was to charge nothing for his services in stronger language than he pleaded it in his answer, for it is there alleged that it was agreed between plaintiff and defendants that no charge was to be made for plaintiff's services, while the jury are told in the instruction that defendants were not liable, if the work done by plaintiff was done under such circumstances as justified defendants in believing that no charge was intended. We cannot see how the jury could have been misled by the first instruction given for plaintiff, with this emphatic declaration on the part of the Court of the non-liability of defendants if they believed, the work done by plaintiff was done under circumstances justifying even a belief on defendants' part that plaintiff intended to make no charge therefor. Judgment affirmed with the concurrence of other Judges.

AFFIRMED.

HARLAN v. ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY CO., APPELLANT.

1. **Railroads:** DANGEROUS CROSSING: VIGILANCE REQUIRED OF COMPANY AND THE PUBLIC. Where a railroad company has a dangerous crossing in a crowded city, it must exercise a degree of care to avoid injuring persons and property commensurate with the danger of accident; on the other hand, persons using such a crossing must exercise care and watchfulness commensurate with the danger to which they are exposed.

2. **Negligence.** The fact that defendant has been guilty of negligence, followed by an accident, does not make him liable for the resulting injury, unless that was occasioned by the negligence.

3. **Contributory Negligence.** Notwithstanding the injured party may have been guilty of contributory negligence, a railroad company is still liable for the injury if it could have been prevented by the exercise of reasonable care on the part of the company after discovery of the danger in which the injured party stood, or if the company failed to discover the danger through its own recklessness or carelessness, when the exercise of ordinary care would have discovered it and averted the calamity.

4. ————. Where the undisputed evidence showed that the negligence of the deceased contributed directly to produce his death, and that it was not possible after he placed himself in danger to prevent the accident, the railroad company is not liable.

5. ————. The acts of the deceased amounted to negligence *per se*.

6. **Practice:** VERDICT: EVIDENCE. Where there is no evidence to support the verdict, the Supreme Court will reverse the judgment.

On Motion for Rehearing.

The case will be found reported and the facts stated in 64 Mo. 480.

Waters & Winslow with *G. F. Rothwell*, for the motion.

I. The prevailing rule in this State is that the question of negligence is peculiarly for the jury, and when there is any evidence, however slight, to sustain the verdict, this court cannot under the precedents interfere. There was

such evidence here. *Kennedy v. N. Mo. R. R. Co.* 36 Mo. 351; *Meyers v. Pacific R. R.* 40 Mo. 151; *Liddy v. St. Louis R. R. Co.* 40 Mo. 506; *Meyer v. Peoples' Rwy.* 43 Mo. 523; *Barton v. St. L. & I. M. R. R.* 52 Mo. 253; *Kennadye v. Pacific R. R.* 45 Mo. 255; *Tabor v. Mo. Valley R. R.* 46 Mo. 453; *Brown v. Hann. and St. Joe R. R.* 50 Mo. 461; *Smith v. Union Rwy. Co.* 61 Mo. 588; *Hicks v. Pacific R. R.* 64 Mo. 430.

II. When the plaintiff acts under *peculiar and complicated circumstances*, or when his view of the danger is obstructed, or when the facts are undisputed, but different minds might honestly draw different conclusions from them, the question of contributory negligence is *exclusively for the jury to determine;* and when the jury have exercised this function the verdict must stand, whatever may be the opinion of the court as to its correctness. *Brown v. R. R. Co.* 32 N.Y. 597; *Beisiegel v. R. R. Co.* 34 N.Y. 622; *Ernst v. R. R.* 39 N. Y. 61; S. C. 35 N. Y. 9; *Davis v. R. R.* 47 N. Y. 400; *Weber v. R. R.* 58 N. Y. 451; *Massoth v. Canal Co.* 64 N. Y. 524; *Gaynor v. R. R.* 100 Mass. 208; *Chaffee v. R. R.* 104 Mass. 108; *Mayo v. R. R.* 104 Mass. 137; *Wheelock v. R. R.* 105 Mass. 203; *Prentiss v. Boston* 112 Mass. 43; *Williams v. Grealy Ib.* 79; *French v. R. R.* 116 Mass. 537; *Craig v. R. R.* 118 Mass. 431; *Penna. R. R. v. Weber* 76 Pa. St. 157; *Weiss v. R. R.* 79 Pa. St. 387; *New Jersey R. Co. v. West* 4 *Vroom* 480; *Penna. R. R. v. Matthews* 7 *Vroom* 531; *D., L. & W. R. R. v. Toffey* 9 *Vroom* 525; *Central R. R. v. Moore* 4 *Zab.* 824; *R. R. Co. v. Stout* 17 *Wall.* 663.

HENRY, J.—The motion for rehearing is based upon the following grounds: *First*—That the court overlooked material facts in the record, showing the peculiar and complicated circumstances surrounding the killing of Harlan, and in overlooking said facts applied a rule of law not otherwise applicable. *Second*—That the judgment of this court is in direct conflict with the case of *Jeff. D. Hicks v. The Pacific*

Railroad 64 Mo. 430, and with other cases heretofore decided by this court.

The facts which it is assumed were overlooked are, that the accident occurred in a crowded city, where the defend-

1. RAILROADS: dangerous crossings: vigilance required of company and the public.

ant had an intricate combination of tracks, side-tracks and switches, almost in constant use, and where the public had a right to expect extraordinary care to prevent accidents. These facts were not overlooked, and we recognize the rule that, under the circumstances stated, the company must exercise a degree of care to avoid injuring persons and property commensurate with the danger of the occurrence of such accidents. But it seems that the counsel do not, as we do, recognize a correspondent obligation on the part of the public to exercise care and watchfulness in crossing a railroad track at such a point, commensurate with the danger to which persons crossing the track there are exposed. The increased care exacted of the company on the one hand, and of the public on the other, is equal, and leaves the question of liability of the company to an adult person of sound mind, in the enjoyment of the senses of sight and hearing, dependent upon the rules applicable if the accident had occurred at any other point on the road.

The evidence that the deceased was guilty of negligence contributing directly to cause his death, is uncontradicted.

2 NEGLIGENCE.

The undisputed facts constitute direct contributory negligence. The case at bar is not like that of *Jeff. D. Hicks v. The Pacific R. R. Co.* 64 Mo. 430, with which counsel think the judgment herein is in conflict. The defence in that case was that Hicks was a trespasser, and that, therefore, the company owed no duty to him. We held otherwise, and that whether a trespasser or not made no difference, if by the exercise of ordinary care the defendant could have avoided injuring him. There was evidence that he was guilty of negligence contributing directly to produce the injury, but there was also evidence to the contrary. There was also a conflict of evidence as to the

negligence of the defendant, but those issues, in proper instructions, were submitted to the jury, and if this court had reversed the judgment, it could have been on no other ground than that the verdict was against the weight of evidence.

In the case we are considering, the judgment was not reversed because the verdict was against the weight of evi-

3. CONTRIBUTORY NEGLIGENCE.

dence, but because there was no evidence to support it. But counsel insist that, aside from Harlan's want of care, the question still remained whether the company could have prevented the accident by the observance of due care, as well as what amounted to due care under the circumstances, and that these propositions are necessarily submitted to the jury in this class of cases, viz: *First*—Was the defendant guilty of negligence? *Second*—Was the plaintiff guilty of negligence contributing directly to the result? *Third*—Notwithstanding the plaintiff's negligence, could the defendant, by the exercise of ordinary care, have prevented the result? It must be borne in mind that the negligence for which the company is liable, is that which directly contributes to produce the injury. The fact that the company has been guilty of negligence, followed by an injury, does not make the company liable, unless the injury were occasioned by that negligence. The connection of cause and effect must be established. For instance, a passing train, by an accident, the result of negligence on the part of the company, is compelled to reverse its engine and run backwards, and in so doing runs over a person crossing the track. The negligence of the company made it necessary to back the train, yet, unless guilty of negligence in running the train backwards, the company would not be held liable for the injury.

But if after discovering the danger in which the party had placed himself, even by his own negligence, the company could have avoided the injury by the exercise of reasonable care, the exercise of that care becomes a duty, for the neglect of which the company is liable. When it is said, in

cases where plaintiff has been guilty of contributory negligence, that the company is liable, if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable, if by the exercise of reasonable care, *after a discovery by defendant of the danger in which the injured party stood*, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity. So that the first and third propositions, which counsel insist should be submitted to the jury in this class of cases, require modifications, as above suggested. The evidence that Harlan's negligence contributed directly to produce the injury, was clear and uncontradicted, and there was no evidence whatever tending to show that after the deceased got on the track, it was even *possible* to prevent the accident. There was no issue to submit to a jury, under the evidence as preserved in the bill of exceptions. The judgment of the court is in harmony with *Hicks v. The Pacific R. R. Co.*, *Evans v. The Pacific R. R. Co.* 62 Mo. 49, *and Fletcher v. The A. & P. R. R. Co.* 64 Mo. 484. The record and authorities cited, and others not cited, have been examined carefully by every member of this court, and all concur in overruling the motion for a rehearing.

4.

Hough, J.—I concur in overruling the motion for a rehearing. It may be conceded that the defendant was guilty of negligence in failing to ring the bell. But the undisputed testimony in the cause shows that the acts of the deceased directly contributing to produce his death amounted to negligence *per se*.

5.

The case standing thus, it is clear that the plaintiff would not have been entitled to recover, as a matter of law. Now if there had been any testimony tending to show that the defendant could, by the exercise of proper care, after discovering the danger to

6. PRACTICE: verdict: evidence.

which the deceased was exposed, have avoided injuring him, then the verdict should be permitted to stand. There was not only no such testimony, but there was testimony to the contrary, and it was therefore properly held, not that the verdict was against the weight of evidence, but that there was no evidence whatever to support the verdict. That this court will interfere in such cases has been repeatedly decided.

OVERRULED.

BABE v. PHELPS, APPELLANT.

Suit to quiet title: POSSESSION: CLAIM OF TITLE: PLEADING. In the statutory proceeding to quiet title to land, when the question of possession is raised by the pleadings, the defendant is entitled to have it tried, although the answer contains no affirmative claim of title in him, if it does not deny the allegation of the petition that he makes such claim.

Appeal from Jasper Circuit Court.—JOSEPH CRAVENS, Judge.

C. B. McAfee, for appellant.

Harding & Buler, for respondent.

NORTON, J. This suit was instituted in the Circuit Court of Jasper County for the purpose of quieting title to certain lands in said county claimed by plaintiff. Plaintiff in his petition alleged that he was the absolute owner in fee simple of an estate of free-hold and in the possession of certain lands therein described, and that he was informed and believed that defendant made some claim of title to the same adverse to the estate of petitioner, and prayed the Court to summon defendant to show cause why he should not bring an action to try the alleged title. Defendant being summoned made his answer in which he alleged that plaintiff was not the owner of the lands described in the peti-

tion, and that the plaintiff was not at the time of filing his petition, nor at any other time, in possession of the said lands or any part thereof. The plaintiff filed his motion for judgment requiring defendant to bring suit to try his title notwithstanding said answer, which motion was sustained by the Court, and judgment rendered against defendant, from which, after ineffectual motions for new trial and arrest of judgment, he appealed to this Court.

Under the statute authorizing the proceeding instituted in this case it is made an indispensable condition to its maintenance that the plaintiff should be in the actual possession of the real property the title to which he seeks to have quieted or settled. It was therefore the right of defendant to deny, as he did in his answer, the fact of possession alleged by plaintiff in his petition, and possession having been denied an issue was presented, which it was the duty of the court to try before making an order requiring defendant to institute his suit to try his title. *Von Phul v. Penn* 31 Mo. 333; *Rutherford v. Ullman* 42 Mo. 216. Inasmuch as the petition of plaintiff alleged that defendant claimed title in the land, his failure to deny that allegation was an admission of its truth, and his failure to set up in his answer his claim of title affirmatively did not deprive him of the right to have the question of possession tried. We therefore think that the Court erred in sustaining the motion and entering judgment for plaintiff. Judgment reversed and cause remanded with the concurrence of the other judges, except Judge Sherwood, absent.

REVERSED.

The State of Missouri v. Cox, Appellant.

1. **Practice, Criminal**: want of prosecution: discharge of prisoner: change of venue. Where a criminal case is taken by change of venue from one county to another on the application of the accused, he is not entitled to a discharge as for want of prosecution, if tried at the second term of the court in the latter county after the filing of the papers in that court.

2. ———. The Supreme Court will not reverse a judgment because the prisoner was not tried within the period fixed by the statute, (Wag. Stat. 1105, §§ 27, 28, 29,) unless it appears by the record that he applied to the lower court for a discharge on that ground.

3. **Change of Venue**: delay in transmission of papers: practice, criminal. Failure of the clerk of the circuit court to transmit without delay to the proper court a copy of the record and proceedings in a criminal case removed by change of venue on the application of the defendant, does not constitute negligence on the part of the prosecution.

4. **Evidence**: confession: murder: bigamy. On a trial for murder, evidence of a confession by the prisoner of an intention to commit bigamy is incompetent.

5. **Murder**: accomplice. The mere mental approval by a bystander of a murder committed in his presence, does not make him an accomplice in the murder.

Appeal from Barry Circuit Court.—W. F. Geiger, Judge.

Lay & Belch, for appellant, cited *McKay v. The State*, 12 *Mo.* 492; *Wheeler v. The State*, 14 *Ind.* 573; *Kelly's Crim. Prac.* § 49; 1 *Greenl. Ev.* § 218, *note.*

J. L. Smith, Att'y Gen'l, for the State. Where a witness to a murder acts in such a manner as to unmistakably evince a design to encourage, incite, *approve of*, or in some manner afford aid or comfort or consent to the act, he is as guilty as the principal.

Napton, J. At the October term, 1875, of the circuit court of Christian county, the appellant Cox, with others, was indicted for the murder of one Davis, on the 11th of December, 1873. The record shows that Cox applied for a change of venue at this term, and upon this application the case was sent to

1. Practice, criminal: want of prosecution: discharge of prisoner: change of venue.

Barry county, where the papers were filed on the 20th of May, 1876. The Barry circuit court is held, as the statute shows, on the second Mondays in April and October. At the October term of the circuit court in Barry county, the case was continued at the instance of the circuit attorney. The record states that this continuance was allowed for good cause, but does not show that the defendant was in court or apprised of the application by any notice to him or his attorney. At the April term, 1877, the case was tried, the defendant was convicted and sentenced to be hanged. The record proper in this case, which is nearly illegible, gives no information whatever as to the time when Cox was arrested. It appears that he was present at the October term, 1875, of the Christian county circuit court, since he then applied in person for a change of venue. Whether he was in confinement or on bail does not appear. The evidence of one Mitchell, as preserved in the bill of exceptions giving the history of the trial, tends to the conclusion that Cox was captured in Texas before this term of the court in Christian county. It would seem from the testimony of another witness, who was a grand juror at the Spring term, 1874, of the Christian county circuit court, that Cox was indicted at that term. What became of that indictment does not appear. The testimony sent up to us, by the bill of exceptions in this case in regard to the killing of Davis, is substantially, indeed we may say is precisely the same as was in the case of Orr, (64 *Mo.* 339.) The present appellant, Cox, was in company with Orr when the murder of Davis was committed.

We are unable to perceive the force of the objection to the conviction in this case, based on the 27th, 28th and
2. —— 29th sections of the sixth article of the act concerning criminal practice. The 27th section provides, that if any person indicted for any offense, and committed to prison, shall not have been brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after such indictment found,

he shall be entitled to be discharged, so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner, or be occasioned by the want of time to try the cause at such second term. The 28th section provides that where the defendant is on bail, and shall not be tried before the end of the third term of the court in which the cause is pending, he shall be entitled to be discharged, unless the delay is occasioned in the same way as specified in the preceding section. The 29th section declares that when an application is made, under either of the two last sections, if the court shall be satisfied that there is material evidence on the part of the State, which cannot then be had, that reasonable exertions have been made to procure the same, and that there is just ground to believe that such evidence can be had at the succeeding term, the cause may be continued to the next term, and the prisoner be remanded or admitted to bail, as the case may require. If the defendant shall not be tried before the end of the term last mentioned, the State shall not be entitled to any further continuance of the case, and the prisoner shall, if he require it, be discharged. It will be observed that the prisoner was tried at the second term, in Barry county, after the removal of the case from Christian county to Barry county. This removal was made on the application and at the instance of the prisoner. If any delay or neglect, on the part of the clerk of the circuit court of Christian county, occurred in transmitting the papers and records to Barry county, such neglect on the part of the clerk can hardly be attributed to any want of diligence on the part of the prosecution. The order for the change of venue, and the delay occasioned thereby, resulted from the solicitations of the defendant and were for his benefit. The first term, then, within the meaning of these provisions of the statute, was by defendant's own choice the October term, 1876, of the circuit court of Barry county, and the second term was in

3. CHANGE OF VENUE: delay in transmission of papers: practice, criminal.

April, 1877, and he was tried at that term. Moreover, the record does not show any application in the circuit court on the part of the prisoner for his discharge, and all three of the sections evidently contemplate that the discharge must be made on the application of the prisoner, and even then the court is authorized to refuse the application for the reasons specified in the last section.

It is deemed unnecessary to decide the point, discussed at considerable length by the counsel for the appellant, in regard to the continuance of the case, at the October term, 1876, made at the instance of the State and in the absence of the prisoner, so far as the record shows, and without any notice to him or his counsel. The judgment must be reversed on other grounds, and the question as to the effect of such a continuance has not, for this reason, been sufficiently considered to justify its determination, and cases may arise in which its determination may be important, and we therefore leave the point for subsequent adjudication.

The witness Mitchell, in detailing his conversation with Cox, on his arrest in Texas, stated among other things that

4. EVIDENCE: confession: murder: bigamy.

Cox told him he was about to get married, produced a license for that purpose, and requested the witness to say nothing about his having a wife in Arkansas. No objection was made to this testimony at the time, so far as the record shows, but an instruction was asked by the defendant, at the close of the case, as follows: "The court directs you to exclude from your consideration all testimony of the witness C. W. Mitchell about or concerning the defendant's talk about marrying in the State of Texas, and that such testimony should not influence your minds at all in considering your verdict." This instruction should have been given.

But the fatal objection to the verdict and judgment in this case, is the second instruction given by the court to

5. MURDER: accomplice.

the jury, which was as follows: "That it is not necessary for the State to prove that the defendant, Albert

Cox, by his own hand shot and killed George W. Davis, for if he was present, aiding or abetting, or counselling, or advising, or inciting, or encouraging, or *approving* of some other persons in shooting and killing George W. Davis, as defined in the first instruction given here for the State, he is guilty of murder in the first degree." If an explanation of the term aiding and abetting, as used in our statute, or in the common law definition of an accomplice, should be deemed necessary, it is proper that the explanatory terms used should convey a correct idea of the meaning of the offense. The court probably did not mean to hold that the mere mental approval by a bystander of a murder committed in his presence, would make such bystander a principal in the murder, yet the use of the disjunctive *or*, between the various terms employed to describe the crime of an accomplice, necessarily leads to this interpretation of the instruction. The words *or approving of*, have no place in legal phraseology to explain the meaning of the words to *aid* and *abet*. The fact itself is incapable of proof. Mental operations, not accompanied with any action or language, are beyond the reach of testimony. There was no necessity for the introduction of these words in the instruction, and they may not have misled the jury, but when a party is on trial for his life, he is entitled to a correct exposition of the law touching his case. The case of *Connaughty v. The State*, 1 *Wisconsin* 169, cited by the Attorney General, is in accordance with these views. In the case of *State v. Orr, supra*, an instruction identical with the one under consideration was given, but in that case the evidence was conclusive that Orr himself shot the deceased, and although the instruction should not have been given, it could not have prejudiced defendant. All of the evidence pointed to Orr as the man who did the shooting. And no one could have heard the evidence and convicted Orr for merely aiding, abetting or approving the murder; but in the case at bar, defendant was indicted for aiding, abetting and encouraging the murder, and the bare possibility that this erroneous

instruction led to his conviction, demands a reversal of the judgment. The judgment must be reversed and the cause remanded. Judges SHERWOOD and HENRY concur; Judges NORTON and HOUGH absent.

REVERSED.

HICKS v. PACIFIC RAILROAD, APPELLANT.

On motion for rehearing, the Court re-affirms the decision reported in 64 Mo. 430.

E. A. Andrews, for the motion.

HENRY, J.—Appellant's attorney files an argument on a motion for rehearing, which, although able and plausible, has failed to convince us that the case has been improperly decided.

The errors assigned are:

First—That under the issues made by the pleadings and testimony, the Court refused to instruct the jury that plaintiff's right to be where he was when injured, affected the question of defendant's liability under the facts and circumstances of the case; and *Second*—That the Court below erred in instructing the jury upon its own motion, and especially upon the question of plaintiff's contributory negligence.

In commenting on the case of *Gillis v. Penn. R. R.*, 59 *Penn. St.* 129, there was no purpose to reflect upon the distinguished judge who prepared the opinion in that case, of whose eminent ability, everywhere acknowledged, we have the highest appreciation. We find no fault with the case, but on the contrary think it was properly decided. The counsel for appellant complains that we quoted and italicised but one line of the opinion. We did this because it is that one line which, applied to the case at bar, asserts

a proposition which in our judgment is not the law. It may not have been a *dictum* in that case, in the connection in which it was used, but wrested from its context it is broad enough to give countenance to a doctrine, which the eminent judge who prepared that opinion we are satisfied would not hold in such a case as this. If we assent to the doctrine so strenuously and ingeniously contended for by the counsel, we must overrule every case decided by this Court, in which railroad companies have been held liable for injuries to persons or stock trespassing on their roads, which could have been avoided by the exercise of ordinary care and watchfulness by their employees running their trains. It is also insisted that the opinion of the Court is in conflict with the case of *Straub v. Soderer*, 53 *Mo.* 38. That case was not overlooked, and we repeat what was said in the opinion, that "the cases cited to show that where one permits another to go on or over his premises, the former is not liable to the latter for injuries received from falling into a pit which had been left open on the premises, and similar accidents, are not in point." We have no fault to find with the decision in that case, but it is decided upon a principle not applicable to the case at bar, and belongs to that class of cases noticed in the opinion and distinguished from this. In copying from Judge Sherwood's opinion, we inadvertently omitted the word *intentionally*; but it makes no difference, for if liable for wanton injury, the company would certainly be liable for intentional injury, and we cannot see why the attorney should call attention to the omission of that word, since it only makes the doctrine the more obnoxious if applied to the case at bar. The difference between this case and *Maher v. the A. & P. R. R. Co.*, 64 *Mo.* 267, between which the counsel thinks there is a conflict, is that in that case the train was running at night, not near a depot, or stopping place, and the employees had a right to suppose, and to act on the supposition, that the track was clear of obstructions, and to make such speed as their business required. In the case at bar the train was

approaching a passenger depot, and the conductor and other employees on the train had every reason to suppose that there were persons standing on that platform, for business or pleasure or both. Whether plaintiff was on the platform by sufferance, or was there as a trespasser, the counsel thinks a very important question, and that one of "the greatest errors committed by the Court" in the opinion was in saying that plaintiff was on the platform by sufferance, and that the orders given him to keep off of the platform were merely advisory. If we are right on the main question, it was a very harmless error, if error at all, for we hold that whether a trespasser there or not, makes no difference as to the liability of the road, and we place his right to recover on the same ground as we do the right of one to recover who is a trespasser on the track, and receives an injury from a train of cars passing, which might have been avoided if the employees of the company had exercised ordinary care and watchfulness.

The objection to the instructions of the Court, in regard to contributory negligence, is not tenable. The instructions clearly state the law on that subject. If the plaintiff makes out a case of negligence against the company, it then devolves upon the company to show that plaintiff's negligence contributed to the injury. He must show negligence in the company, but is not bound in the first instance to prove himself not guilty of negligence contributing to the injury sustained.

Motion overruled. All concur except HOUGH, J., not sitting.

OVERRULDED.

STATE OF MISSOURI v. ABLE, APPELLANT.

Practice, Criminal: TRIAL: PRESENCE OF PRISONER. Unless it affirmatively appears from the record in a criminal case, that the prisoner was present during the progress of the trial, and at the rendition of the verdict, a judgment against him will be reversed.

Appeal from Jasper Circuit Court.—JOSEPH CRAVENS, Judge.

W. C. Robinson and *H. B. Johnson*, for appellant.

J. L. Smith, Atty. Gen., for respondent.

NORTON, J.—The defendant was indicted in the McDonald Circuit Court, at its June term, 1874, for murder in the first degree, in killing one John L. Lane. At the October term, 1874, of said court, on defendant's application, a change of venue was awarded to the Circuit Court of Jasper County, in which latter court, at its March term, 1875, defendant was put upon his trial, which resulted in a verdict of guilty. Motions for new trial and in arrest of judgment were in due time filed, and being overruled, defendant brings the case here by appeal. The grounds relied upon for a reversal of the judgment are, that the court erred in overruling defendant's application for a continuance; that the record does not show the arraignment of prisoner and his plea of not guilty before the jury were sworn; that improper evidence was admitted on the trial; that improper instructions were given and proper instructions refused; that the record does not show that the prisoner was present during the progress of the trial. If the last reason assigned exists in point of fact, it will necessitate a reversal of the judgment, and obviate the necessity for a consideration of the objection to the action of the court in refusing a continuance and having the jury sworn before arraignment and plea of not guilty was entered. The record shows that, on the 13th day of March, the jury was sworn, and the further trial continued till the next day, at which time, it being the *fourteenth* of March and the sixth

judicial day of the term, the trial, not being completed, was continued till *Monday* the *fifteenth* of March. No further notice, after the continuance on the 14th, is taken, either of the jury or defendant, till the 18th day of March, at which time the jury returned their verdict. The record does not show that the trial was proceeded with on Monday, the 15th of March, or at what time the trial was closed or the jury retired to consider of their verdict. However well this case may have been tried in other respects, the condition of the record is such that, under repeated decisions of this court, the judgment rendered cannot be allowed to stand. 20 Mo. 55, 25 Mo. 167, 28 Mo. 332, 31 Mo. 147, 36 Mo, 397, 49 Mo, 326, 57 Mo. 40, 59 Mo. 154, 61 Mo. 232.

It ought to be understood by the circuit clerks, prosecuting attorneys and circuit judges, that this court, in an unbroken line of decisions, extending from 20 Mo. to 63 Mo., has held that, unless it affirmatively appears from the record in a criminal case that the prisoner was present during the progress of the trial and at the rendition of the verdict, the judgment rendered in such case will be reversed. In view of the frequent imperfection of records in this respect, necessitating in criminal cases the reversal of judgments, accumulation of cost and delay of justice, it is deemed appropriate to observe that section 6, *Wag. Stat.* 419 provides that "full entries of the orders and proceedings of all courts of record of each day shall be read in open court on the morning of the succeeding day, except on the last day of the term, when the minutes shall be read and signed by the judge at the rising of court." It may be remarked that if this provision of the law, intended to prevent just such omissions as are manifest in the record before us, was executed and observed, such errors would be less frequent and the administration of the law made more effectual.

Judgment reversed and remanded, in which the other judges concur.

REVERSED.

WILHELMI v. WADE ET AL., APPELLANTS.

1. **U. S. Succession Tax**: LIEN OF: PERSONAL LIABILITY FOR. A purchaser of land, upon the descent of which a succession tax is due under the act of Congress (2 *Bright. Dig.* 370, § 327), incurs no personal liability to pay it; but takes the title subject to a lien for it.

2 ———. No one can be made liable for payment of a share of the succession tax due on the descent of a tract of land greater than his share in the land.

3. ———: PAYMENT BY SHERIFF. The act of Congress does not authorize a sheriff, who has sold land and collected the proceeds under an order of court in a partition suit, to pay the succession tax due upon the descent of the land.

Appeal from Franklin Circuit Court.—D. Q. GALE, Judge.

John W. Booth for appellant.

HOUGH, J.—Jesse R. Stanley died in 1865, intestate, seized of certain lands in Franklin county. At the death of said Stanley, the defendants were, and now are, husband and wife. The defendant Olivia was a daughter of said Stanley, and inherited one-sixth part of his estate. She and two other heirs, owning in the aggregate one undivided half of said lands, conveyed the same to one Chapman W. Wade, who subsequently conveyed the same to the defendant, Green P. Wade, who, with his co-tenants, instituted proceedings in the Franklin Circuit Court for the partition of said lands. Said lands were ordered to be sold in partition, and the plaintiff, who was at the time sheriff of said county, made the sale, and after the expiration of his term of office, collected the purchase money and distributed the same according to the order of the court.

After making distribution as aforesaid of the proceeds of the sale, the plaintiff, without any authority or solicitation from either of the defendants, voluntarily paid out of his own funds, to the United States Collector the sum of one hundred and sixteen dollars and six cents, as a succession tax due to the United

1. U. S. SUCCESSION TAX: lien of: personal liability of.

States on account of the descent of the lands aforesaid from the said Jesse R. Stanley, and brought the present suit to recover from the defendants one-half of the tax so paid. The plaintiff obtained judgment against both defendants for one-half of said tax, from which judgment they have appealed to this court.

Conceding that the wife could be made personally liable for the pecuniary obligation imposed upon her during
2. ———. coverture, by reason of the succession aforesaid, still she could only be held liable for one-sixth, and not one-half of the amount paid by the sheriff, for her interest in the lands never at any time exceeded one-sixth thereof. On the other hand, the defendant, Green P. Wade incurred no personal liability on account of the succession tax due from the heirs, by reason of his purchase from them of their interests in the land inherited by them. He took their interests subject to a lien in favor of the United States, for the amount of the tax due (*Brightly's Digest*, vol. 2 p. 370 sec. 327), and such lien could be enforced against the land, but no personal judgment could be rendered against him therefor.

Again, we are unable to see by what authority the sheriff undertook to pay the tax in question. By section
3. ———: payment of sheriff. 320, *Int. Rev. Law*, *Brightly's Digest*, vol. 2 p. 369, it is provided that "the interest of any successor in moneys to arise from the sale of real estate, under any trust for the sale thereof, shall be deemed to be a succession chargeable with duty under this act, and the said duty shall be paid by the trustee, executor, or other person having control of the funds." This provision is not, in our opinion, applicable to sales in partition, and the sheriff who makes such sales is not a "trustee, executor, or other person having control of the funds," within the meaning of said section. That section plainly refers to lands which are transmitted by deed or will, charged with a trust for the sale thereof, and not to lands which pass to the successor under the statute of descents, and are subsequently

sold in partition, or under a judgment against the heirs. The sheriff having apparently acted in good faith, under a mistaken view of his duty, is, in conscience, entitled to be reimbursed by the parties originally liable for the tax; but that fact cannot alter our duty so far as the present judgment is concerned.

The judgment will be reversed and the cause remanded. All the judges concur.

REVERSED.

COCKRELL v. PROCTOR ET AL., APPELLANTS.

1. **Evidence**: PRESUMPTION. A deed will be presumed to have been properly excluded from evidence, when the reasons for its exclusion do not appear in the record.
2. **Instructions** should not be given upon an issue in relation to which there is no evidence before the jury.
3. **Covenant of Seizin**: PRACTICE: BURDEN OF PROOF. Where in an action on a covenant of seizin the defendant admits the covenant and alleges seizin in himself at the date of the deed, it devolves upon him to prove the seizin, and if he fails, the plaintiff will recover.
4. **Covenant of Seizin**: PARAMOUNT TITLE. The existence of a paramount title, whether asserted or not, is a breach of the covenant of seizin, whether it be express, or be implied by the words, "grant, bargain and sell."
5. **Paramount Title**: ABANDONMENT OF PREMISES: FAILURE TO OCCUPY: MEASURE OF DAMAGES. If a grantee fails to take possession of unoccupied premises conveyed by his deed, or having taken possession abandons them, he can recover of his grantor nominal damages only for breach of his covenant of seizin, unless there was a hostile assertion of a paramount title.

Appeal from Dade Circuit Court.—J. D. PARKINSON, Judge.

Morgan & Buler and *H. H. Harding* for appellants.

1. The plaintiff might have ignored the statutory covenants, and declared upon the special covenants contained

in the latter clauses of the deed, and had he done so, he would perhaps have been entitled to recover full damages without evidence of eviction or the purchase of a paramount title; but he chose to declare upon the compound covenants, alleging that the defendants were not seized of an indefeasible estate in fee simple. Having done so and failed to prove an eviction or the purchase or even existence of a paramount title or encumbrance, he cannot recover more than nominal damages. *Moseley v. Hunter*, 15 *Mo.* 322; *Maguire v. Riggin*, 44 *Mo.* 512.

2. Plaintiff having been either actually or constructively in possession of all the land, an eviction must be shown to entitle him to more than nominal damages.

3. Upon the pleadings the burden of proof of title devolved upon the defendants and that of damages on the plaintiff. No legal evidence upon the subject having been introduced by either side, the damages should have been only nominal.

4. The rule that the measure of damages on a broken covenant of seizin is the consideration paid, is predicated upon the principle that that covenant, if broken at all, is broken the instant it is made, and consequently cannot run with the land; but the statutory covenant of seizin runs with the land, and where possession is taken, as it was in this case, an eviction or a forced purchase of a paramount title must be shown before substantial damages can be recovered. *Chambers v. Smith*, 23 *Mo.* 174.

T. H. Walser, for respondent.

1. The covenant of seizin is a personal covenant; it is in the present tense, which, if broken at all, is broken at the moment of its creation, and is immediately converted into a mere chose in action, which is incapable of running with the land; the breach extinguishes the covenant. This rule is subject to the exception that, when possession accompanies the conveyance, the covenant is transformed

into one of indemnity only, and the measure of damages in that event is the actual loss sustained; and the right of action runs with the land and enures to the party in whom the right of substantial recovery exists. The covenant of seizin runs with the land when possession is taken under the deed; but where there is no title in the grantor, and possession has not accompanied the deed, the covenant is broken the moment it is made. *Tapley v. Labeaume*, 1 *Mo.* 552; *Rawl on Cov.*, 318; *Reese v. Smith*, 12 *Mo.* 347.

2. In declaring on the breach of covenant of seizin of an indefeasible estate in fee, it is only necessary for the plaintiff to negative the covenant generally. *Rawl on Cov.*, 82; *Pollard v. Dwight*, 4 *Cranch* 430. A reconveyance was not necessary. *Lawless v. Collier*, 19 *Mo.* 480.

3. The burden of proof as to title was on the defendants; having introduced no evidence at all, the judgment as a matter of law would have been for the plaintiff, but the measure of his recovery could only be ascertained from proof, which was afforded by the evidence, which even went further: it was to the effect that the defendants had no title, that they were not in possession themselves when they made the deed, and did not put the plaintiff into possession. If that is true, (and the Court as a jury found it was, and this Court will not enquire into the weight of evidence,) then the finding was for the right party, and the amount fell below the true amount of damages instead of being excessive.

4. Defendants cannot shift responsibility from their own shoulders by imposing it on their grantee to aver and prove at his peril any particular outstanding title. *Rawl Cov. Tit.*, 4*th ed.* 84, *note* 2; *Abbott v. Allen*, 14 *John.* 253. They pleaded that they were lawfully seized of the premises. Upon this question they assumed the affirmative; it was to their interest to prove it, as it would operate as a bar to the action. The presumption was that they were not seized of any estate whatever, on their failure to introduce the evidence of title, which is always presumed to be

in the possession of the covenantor, and upon that failure the plaintiff, on introducing his deed, is entitled to judgment, as of an entire failure of title. *Schofield v. Iowa Co.* 32 *Iowa* 321; *Rawl Cov. Tit.* 4*th ed.* 84, *note* 3.

HENRY, J.—This was an action commenced in the Barton Circuit Court by plaintiff, to recover damages for an alleged breach of the covenant of seizin, in a deed executed to him by defendants in 1866, conveying the east ½ of the south-west ¼ of section 19, township 32, of range 30, the east ½ of the north-west ¼ of section 8, east ½ of section 5, south-west ¼ of section 5, east ½ of north-west ¼ of section 5, north-west ¼ of north-west ¼ of section 5, all of section 22, south-west ¼ of section 14, and the east ½ of south-east ¼ of section 14, all in township 32, range 31, and lying in Barton County. The deed conveyed the land by the words *grant, bargain and sell*, and there was also an express covenant that the grantors were seized of an indefeasible estate in fee simple in the premises, and the breach assigned was, that said grantors were not, at the date of the delivery of the deed, seized of an indefeasible estate in fee simple in said lands, and plaintiff alleged that they were not then in possession of any portion of said land, and that plaintiff has never been in possession of the same, or any part of them. In his petition plaintiff does not specify any particular incumbrance or paramount title. Defendants by their answer admit the execution of the deed, and aver that they were, at the date of the deed, seized of an indefeasible estate in fee simple in the said land, and that plaintiff entered upon and held the possession of said land under the deed. On the trial in open court plaintiff entered a disclaimer as to damages for breach of the covenant as to the following tracts of said land, viz: east half of section 5, north ½ of north-west ¼, and south-west ¼ of north-west ¼ of section 5, and the east half of north-west ¼ of section 8. The evidence proved that plaintiff, or those claiming under him, were at the trial in possession of the last described land;

that in 1866, after the execution of the deed, plaintiff entered into the possession of section 22, and that one of his sons built a house upon it, and in 1867 abandoned the possession, learning, as he alleges, that he had no title to the land. There was no suit against him, or demand made of him, for the possession of the land, or any portion of it, nor was any portion of the lands in the actual possession of any one else.

I. Plaintiff introduced in evidence a deed from Theodosia Smith, administratrix of Albert J. Smith's estate to himself, conveying to him the east ½ of south-west ¼ of section 19, above described, dated March 21st, 1867, the consideration named therein being $560, but at the conclusion of the evidence the court excluded it. The case was tried in the Dade Circuit Court, (to which it had been taken by change of venue), by the court, without the intervention of a jury, and plaintiff had a verdict and judgment for $3,374, and the defendants have brought the case here by appeal.

1. EVIDENCE: presumption.

II. For plaintiff, the court gave the following declarations of law: *First*—The defendants having failed to show any title in them for section 22 and the east ½ of the south-east ¼ of section 14, and the south-west ¼ of section 5, township 32 of range 31, the finding should be for plaintiff. *Second*—If the court find from the evidence that plaintiff bought in a paramount title to the east ½ of the south-west ¼ of section 19, township 32, of range 31, the finding should be for plaintiff, and the damages assessed at the amount paid by said Cockrell for said land, with six per cent. interest from date of payment to date. The *third* instruction declared the measure of damages to be the value of the land as estimated by the parties, each tract at the price fixed upon it in the trade, with six per cent. interest from the date of the deed, where no possession was had, and from the time that the beneficial possession ceased in any tract of which plaintiff had possession. The defendant asked the court to declare the law as follows, substan-

2. INSTRUCTIONS.

tially: that plaintiff, having taken possession of section 22 and abandoned it, could not recover more than nominal damages for that tract; that plaintiff could not, without offering to reconvey, recover more than nominal damages in regard to the east ½ of section 14 and the south-west ¼ of section 5; that, under the testimony, plaintiff was entitled to nominal damages only. The court refused to give these declarations of law.

III. Defendants alleged seizin in themselves at the date of the deed, and it devolved upon them to prove it, and as they offered no evidence to show that they were so seized, the first instruction was properly given. *Bircher v. Watkins* 13 Mo. 522.

3. COVENANT OF SEIZIN: practice: burden of proof.

After excluding the deed from Smith's administratrix to plaintiff, there was no evidence to warrant the second instruction given by the court at the instance of the plaintiff. Why it was excluded, does not appear, but we assume that the action of the court in excluding the deed was proper. Because the court gave that instruction, the judgment should be reversed; but as the cause will be remanded to be retried, we will briefly consider the other questions presented by the record.

IV. The existence of a paramount title, whether asserted or not, is a breach of the covenants of seizin specifically expressed in the deed, as well as of that contained in the words *grant*, *bargain* and *sell* employed in conveying the lands. Where, under the deed, the grantee takes possession of the premises conveyed, he can recover only nominal damages until he has been compelled by the assertion of the paramount title to yield the possession to the claimant. *Collier v. Gamble* 10 Mo. 467, *Bircher v. Watkins*, 13 Mo. 521, *Dickson v. Desire's admr.* 23 Mo. 151, *Murphy v. Price*, 48 Mo. 247.

4. ———: paramount title.

V. If the lands conveyed had been in the possession of a stranger, holding at the date of the deed under a para-

5. PARAMOUNT TITLE: abandonment of premises: failure to occupy: measure of damages.

mount title, as nothing would have passed to the grantee by the deed, the covenant would have been broken as soon as made, and substantial damages could have been recovered by the grantee. But in the case at bar, plaintiff had actual possession of all of the lands, except two small tracts, and might have taken possession of those, as they were, like the balance, unoccupied, and so continued to the time of the trial. He had no right to abandon the possession of section 22, in the absence of a hostile assertion of a paramount title, and claim substantial damages for a breach of the covenant of seizin. In regard to the tract of land conveyed, which the plaintiff did not, but might have, taken possession of, the rule is the same. He must act in good faith toward his grantor, and make the most of the title he has acquired, and only yield possession to the hostile assertion of a paramount title, either by a suit to recover the land, or a distinct assertion of the paramount title and a demand of possession. The second and third instructions were erroneous.

Judgment reversed and cause remanded. All concur except NORTON, J., not sitting.

REVERSED.

JOHNSON ET AL., APPELLANTS, v. BOARD OF EDUCATION.

Appeal: INJUNCTION: FINAL JUDGMENT. No appeal lies from an order dissolving a temporary injunction and awarding damages and costs.

Appeal from Clinton Circuit Court.—HON. PHILANDER LUCAS, Judge.

J. E. Merryman and *J. M. Lowe* for appellants.

Thos. E. Turney and *Thos. J. Porter* for respondent.

HOUGH, J.—This was a proceeding to enjoin a township

board of education, in Clinton County, from removing a school house in a certain sub-district, and from carrying into execution an order of said board, re-districting the township. A temporary injunction was granted, which, after answer filed, was on motion dissolved. The only judgment in the case is one dissolving the injunction and awarding one cent damages and costs against the sureties in the injunction bond. Appeals are allowed, by our statute, from final judgments only. This is not a final judgment. It has been held in Illinois (*Titus v. Mabee*, 25 Ill. 257) and perhaps elsewhere, that where an injunction is the sole object of the bill, a decree dissolving the injunction may be regarded as final, for the purpose of an appeal. But a different rule was established in this State more than fifty years ago, in the case of *Tanner v. Irwin*, 1 Mo. 65, and that rule has been recently followed in the case of *Carpenter v. Talbot*, decided at the February Term, 1873, at St. Joseph, but not reported.

The appeal is premature, and must be dismissed. All the judges concur, except Judge SHERWOOD, absent.

DISMISSED.

ROTCHFORD v. CREAMER, APPELLANT.

1. **Practice in Supreme Court:** BILL OF EXCEPTIONS: MOTION FOR NEW TRIAL. The supreme court will not examine into the merits of a case where no motion for new trial is incorporated in the bill of exceptions, though the bill shows that such a motion was made and was overruled.

2. **Exceptions to referee's report must appear in bill of exceptions.** Where exceptions to a report of a referee are relied on for reversal of a judgment, they must either be incorporated in the bill of exceptions, or so referred so as to identify them.

Appeal from St. Louis Circuit Court.—HON. GEO. A. MADILL, Judge.

Matthew O'Reilley, for appellant, filed an argument elaborately discussing the exceptions to the referee's report.

Henry A. Clover, of counsel, for appellant.

Gottschalk for respondent.

SHERWOOD, C. J.—I. This proceeding had for its object the settling and adjustment of the affairs of a co-partnership. By consent of parties the matters of difference were, by order of the court, submitted to a referee, who took testimony and made his report, which (with the exception of one modification which the court made of its own motion) was confirmed and judgment rendered for plaintiff, and this judgment the court in general term affirmed. We are precluded from any examination into the merits of the cause, because the motion for a new trial is not incorporated in the bill of exceptions. It is true that bill mentions the fact that the motion for a new trial was overruled; but what that motion was, or that it is even contained in the transcript, is not stated. Under all our previous rulings this defect is fatal.

1. PRACTICE IN SUPREME COURT: bill of exceptions: motion for new trial.

II. In addition to that, the exceptions to the report of the referee, whereon the defendant relies for a reversal, are not incorporated in the bill of exceptions, nor so referred to in such bill as to designate and identify them. These reasons require an affirmance of the judgment. All concur.

2. EXCEPTIONS TO REFEREE'S REPORT MUST APPEAR IN BILL OF EXCEPTIONS.

AFFIRMED.

STATE OF MISSOURI EX REL. SHARP v. MILLER, APPELLANT.

1. **School Districts, extension of:** CONSTITUTION. The act authorizing boards of education in cities, towns and villages to extend the limits of the territory attached for school purposes, beyond the corporate limits (Sess. Acts 1868 p. 163–4) is constitutional, although it does not require the consent of the districts affected by such extension.

2. ———. The board of education of a town which has been organized into a special school district may, under this act, by resolution annex additional territory, although previous to such annexation the district did not extend beyond the limits of the town.

3. **Schools**: TAXATION: CONSTITUTION. Sec. 8 Art. 9 Constitution of 1865, amounts to a mandate to the legislature to provide the means of sustaining a free school in each district in the State at least four months in each year, but does not prohibit a larger provision.

Appeal from Macon Circuit Court.—HON. J. W. HENRY, Judge.

Gilstrap, Dysart & Brown for appellant.

I. The act of 1868 is unconstitutional. Under its provisions, a special school board, with jurisdiction over a fractional part of a former district, could incur a large indebtedness, and then, by pushing out their boundaries by a simple resolution, subject the property included within the extension to the payment of liabilities, which the owners had no part in creating, and forcing them into another and different jurisdiction. A whole district, with its school houses and property, may thus be absorbed without their consent. If the legislature can authorize an extension of one and one-half miles, it can authorize any extension. Such a power would be destructive to the interests of surrounding townships.

II. The act of 1868 intends to authorize extension by the special district only when there is territory attached to the district outside the city proper, derived by surrender from the township board, under the act of 1867.

III. The tax is levied in violation of Art. 9, § 8 of the Constitution of 1865.

B. G. Barrow and *Eli J. Newton* for respondent.

NORTON, J.—This was a proceeding instituted in the County Court of Macon County, under section 183 Wag. Stat. 1196, for the purpose of obtaining judgment to enforce the lien of the State against certain real estate of defendant, for taxes alleged to be due thereon. Upon a trial before the County Court, plaintiff obtained jugdment, from which defendent prosecuted an appeal to the Circuit Court, where, upon a new trial, plaintiff again obtained judgment, from which defendant has appealed to this Court. It appears from the evidence in this case, that the town of La Plata was organized as a separate school district under the provisions of chap. 47 p. 274 of the Gen. Stats. of 1865; that at the time of such organization it did not embrace the lands upon which the tax sought to be enforced was levied, but that subsequently to its organization under section 1 Acts 1868 p. 164, the board of education of the special school district town of La Plata, by resolution duly adopted, extended the limits of the territory attached; that the extension of the limits of said district under said resolution embraced or included the land of defendant, against which plaintiff was seeking to enforce the lien of the State for taxes unpaid; that there was due on said land school taxes for the years 1871 and 1872, which had been levied for the support of the public school of the town of La Plata; that the notice required to be given under section 184 Wag. Stat. 1197, that application would be made to the County Court for judgment against said land, had been given. On the trial, objections were made to the admission of evidence tending to establish the above facts, and also to the action of the court in refusing the instructions asked for by defendant. Inasmuch as the plaintiff failed to recover judgment for the taxes claimed to be due for the year 1871, it is unnecessary to notice the objection to the admissibility of the notice received in evidence in relation thereto, as defendant and

appellant has not been prejudiced thereby; and as the objections to the evidence offered apply also to the action of the court in refusing instructions, we will consider them in reviewing the instructions. The declarations asked and refused were as follows: *First*—In acquiring the territory claimed by the extension of the district, no presumptions in favor of the action of the district board, or any officer, can be indulged, and if the court finds from the evidence that no territory had been previously attached to said district by proper authority, other than the remaining territory of district No. 2, then the school board of La Plata special school district had no power whatever, under the act of 1868, to extend the limits or boundaries of the said special school district. *Second*—That the said act of 1868 is unconstitutional and void. *Third*—That the school law does not authorize the levying of any school tax for purpose of tuition, in pursuance of the constitution of the State, and is therefore void, and confers no authority to levy such a tax. *Fourth*—That upon the whole law of the case and testimony, plaintiff is not entitled to recover.

I. It is insisted by counsel that the first instruction should have been given on the theory that under the act of

1. SCHOOL DISTRICTS, EXTENSION OF: constitution.

1867, sec. 1, pages 165, 166, and sec. 1 of the act of 1868, p. 163–4, the board of education of the town of La Plata had no authority to extend, by resolution, the limits of the territory subject to their control as a school district, because no territory had been previously attached to the special school district of the town of La Plata. This, we think, is a misconception of the acts referred to. The act of 1867 provides that any *township board of education* may set off from any district in said township, so much territory as in their estimation will advance the general interests of education, and annex the same for school purposes to any city, town or village organized for school purposes, and, upon the passage of a resolution by the township board of education, setting off and annexing any territory to any such town, city or vil-

lage, the same shall be effectual for that purpose when approved by the board of education of such town or city.

II. The act of 1867 provides for the country taking in the town or village, and is to be put in force by the *board* 2. ——. *of education of the township*, while the act of 1868 provides that a town, which has been duly organized into a special school district, may annex or attach additional territory to its limits, by a mere resolution of the board of education of such town or city, provided the territory attached does not extend more than one mile and a-half from the limits of the corporation of any such city or town. It would therefore seem to be manifest that it was entirely within the power of the board of education of the special school district of the town of La Plata to attach additional territory to that already, or originally, composing the district, and, under this view, the instruction asked was rightly refused. *State ex rel. v. Board of Education of Appleton City*, 53 Mo. 127.

We can see no force in the objection made to the constitutionality of the act of 1868. Whether the provisions it contains are wise or unwise, just or unjust, we are not to adjudge. It was the province of the legislature to determine that question, which they have done. It may, however, be observed that both the acts of 1867 and 1868 have been modified and changed by the subsequent act of 1870. Wag. Stat. 1267 sec. 17.

III. Nor do we see any force in the objection that, under sec. 8 art. 9 of the constitution of 1865, the legisla-

3. Schools: taxation: constitution.

ture had no power to authorize a larger tax to be imposed than was necessary to make up what the school fund might lack to maintain a free school at least four months in every year, in each school district in the State. That section is not to be regarded as a limitation upon, or curtailment of, the power conferred upon the legislature in section 1 of the same article of the constitution, which makes it obligatory on the legislature to establish and maintain free schools for the gratuitous

instruction of all persons in the State between the ages of five and twenty-one years. It is to be considered rather as a mandate to the legislature to provide the means for sustaining a free school in each district for the period of *at least* four months, without containing a negation of the right of the legislature, under section 1, to provide the means for maintaining such schools for a longer period than four months.

Perceiving no error in the refusal of the instructions asked, the judgment is hereby affirmed. All concur.

AFFIRMED.

HARDWICK v. JONES ET AL., PLAINTIFFS IN ERROR.

1. **Sheriff interested:** PROCESS, EXECUTION OF: CORONER. A sheriff who owns stock in a corporation, has no such interest as will disqualify him, either at common law or under the statute concerning coroners, (*Wag. Stat.* 284 §3) from executing process in a case to which the corporation is a party.
2. **Judicial Sale:** SHERIFF INTERESTED. A purchase by a corporation at execution sale is not void because the sheriff conducting the sale is at the time a stockholder in the corporation.
3. **Ejectment:** OUTSTANDING TITLE. A defendant in an action of ejectment, who claims adversely to both the parties to a mortgage, which is due and unsatisfied, can not avail himself of the mortgage as an outstanding title to defeat the action.
4. **Fraud.** It is no fraud on the part of the holder of several judgments to sell under a junior judgment, notifying bidders of the lien of those which are older.
5. **Land, conflicting claims to.** A person claiming title to land does not forfeit his right by attempting to buy in a conflicting claim.
6. **Ejectment:** VOLUNTARY CONVEYANCE. It is no objection to the plaintiff's title in ejectment that he is not a purchaser for a valuable consideration.

Error to Jackson Circuit Court.—HON. SAMUEL L. SAWYER, Judge.

Jenkins & Twitchell, for plaintiffs in error.

1. The plaintiff was not entitled to judgment, for the reason that there was an outstanding deed of trust, and at the time of trial the debt was due. *Myer v. Campbell*, 12 Mo. 603; *McCormick v. Fitzmorris*, 39 Mo. 24; *Johnson v. Houston*, 47 Mo., 227; *Harrington v. Fartner*, 58 Mo. 478.

2. The sheriff's deed to the Farmers' Bank of Missouri and J. W. Reid should have been declared void by the Court. The sheriff who made the levy was a director in the bank, and his successor who subsequently made the sale, was a stockholder in the bank at the time of the sale, and the bank was a purchaser; thus, the sheriff making the sale was directly interested in the purchase, and subsequently received dividends from the bank. This is in direct violation of the statute (Wag. Stat. page 611 sec. 49). and repugnant to principles long established, and recognized and enforced by the Federal Courts, by the Courts of nearly all of the States and of England. *Wormley v. Wormley*, 8 Wheat. 421; *Wooton v. Hinkle*, 20 Mo. 290; *Neal v. Stone*, 20 Mo. 294; *Turner v. Adams*, 46 Mo. 95; *Durfee v. Moran*, 57 Mo. 376; *Kruse v. Steffens* 47 Ill. 114; *Fox v. Makreth*, 2 Brown's ch. 400; *Davoue v. Fanning*, 2 Johns. ch. 252; *Gardner v. Ogden*, 22 N.Y. 327. Especially has this court placed the seal of its condemnation upon such practices. *Thornton v. Irwin*, 43 Mo. 153. It is not necessary to prove actual fraud, but the fact that the officer, who is the agent of both plaintiff and defendant, is interested in the purchase, is held sufficient to vitiate the sale.

3. The sheriff being a stockholder in the bank, was incompetent to execute process in a case in which the bank was a party, and the execution should have been directed to the coroner of the county. Wag. Stat. 284, sec. 3; *Inhabitants v. Cole*, 8 Mass. 96; *Inhabitants v. Ints. of New Gloster*, 14 Mass. 216; *Thayer v. Ray*, 17 Pick. 166. The sheriff's interest was sufficient to have disqualified him as a witness in the case, under the former rules of evidence (*Robbins v. Butler*, 24 Ill. 387), and for the same reason disqualified him from serving process.

F. M. Black and *J. E. Merryman*, for defendants in error.

1. While a defendant in ejectment, in possession of property under a forfeited deed of trust or mortgage, may protect his possession against the mortgagor, still it is manifest that this principle has no application in this case. The defendants claim, in opposition to the deed of trust, not under it. The mortgagee in possession alone, could avail himself of such a defense. To this deed of trust the defendants are strangers, and to them it is no defense. *Woods v. Hilderbrand*, 46 Mo. 284.

2. The rule that a purchase by a trustee of the trust property is voidable at the instance of the *cestui que trust* can have no application. Neither of the sheriffs held any such relation toward Shrader, much less toward the defendants. They acted solely as officers, and were not purchasers. Moreover, the relation of trustee and *cestui que trust* does not exist between a corporation and its stockholders. Angel & Ames on Corp., sec. 313; 1 Edw. Ch. R. 87; 1 Miss. Ch. 174; 1 R. I. 1.

3. The sheriffs who made the levy and sale were not incapacitated to act because they were stockholders in the bank. *Merchants' Bank v. Cook*, 4 Pick. 405; *Adams v. Wiscasset Bank*, 1 *Greenl.* 361; Angel & Ames on Corp. sec. 639. The cases referred to by the plaintiff in error, in the 8th and 14th Mass. and 17 Pick., were suits against the "inhabitants of a town." The sheriff was one of the inhabitants, and in case of judgment it could be levied on the property of any inhabitant; and for this reason the sheriff was held to be a party to the suit, under the statutes of that State; but we have seen that there such rule does not apply to a stockholder of a moneyed corporation. 4 Pick. 405. The objections, if they were of any force, should be taken by way of abatement of the writ or motion to set aside the sale, and now, after a sale, they come too late.

HENRY, J.—This was an action of ejectment, originally in the Circuit Court of Clay County, for the recovery of a tract of fifty acres of land. It was taken to Jackson Circuit Court on change of venue, and there tried at the October Term, 1873. It is admitted that on the 24th day of April, 1865, Stephen Shrader owned and was in possession of the land; that on the first of May, 1861, two judgments were rendered by the Clay Circuit Court against said Shrader, and on the second day of May, 1862, nine others were by said court rendered against him; that prior to the rendition of these judgments, on the 26th of April, 1860, the State to the use of Clay County recovered a judgment against said Shrader and others for $8,919.60; that at the time of the sale hereinafter mentioned, the Farmers' Bank of Missouri owned and controlled all of said judgments; that said bank and John W. Reid as its attorney caused executions to issue on the judgments above mentioned, and had them levied on the land in controversy; that it was duly advertised for sale by the sheriff, Gittings, and sold at the proper time and place, under the executions issued on the judgments of 1861 and 1862. At this sale on the 27th day of April, 1865, said Farmers' Bank and John W. Reid became the purchasers, at the price of $100, and obtained the Sheriff's deed for the land. Afterwards Thomas McCarty, Darwin J. Adkins, Joseph T. Field and Reid purchased the interest of the bank, and plaintiff claims by purchase from them. At the date of said sale by the sheriff said Shrader was insolvent, and in March, 1868, was duly adjudged a bankrupt, and Samuel A. Vose was appointed his assignee, and as such, by order of the United States District Court for the Western District of Missouri, sold said land at public sale on the 7th day of September, 1869, and defendants purchased it at the price of $2,990. They were informed when they purchased that Reid, McCarty, Adkins and Field had purchased said land at the prior sale. Reid, however, bid for the land at the sale by the assignee, and defendants alleged that they were

deceived and misled by his bidding into the belief that they were buying a good title. The answer charges that said Gittings, Reid, McCarty, Field and Adkins combined and confederated together to cheat and defraud the other creditors of Shrader and said Shrader; that the sale under the junior judgment was made in furtherance of such fraudulent purpose, and that at the sheriff's sale they declared that whoever purchased the land would purchase it encumbered with the lien of the judgment rendered in 1860, and thereby deterred bidders. The replication denied the allegations in the answer except as above stated. At the time of the sale by him as sheriff, Gittings was a stockholder in the said bank, as was also the sheriff, his predecessor, who levied the execution on the land. Plaintiff, to secure the purchase money, $9,000, which he agreed to pay for the land, executed a deed of trust, conveying the same to A. J. Calhoun, and the condition was broken when this suit was instituted by the failure of said plaintiff to pay said money at the time named in said deed of trust. The land was at the time of sheriff's sale worth $10,000. The Court tried the case without the intervention of a jury and its finding and judgment were for plaintiff, and defendants have brought the cause here by writ of error.

I. It is contended by plaintiffs in error that the levy by the sheriff, F. R. Long, he being a stockholder in the bank, as also the sale by Gittings as Sheriff, he being likewise a stockholder in the bank, rendered the sale on the executions void, and in support of this position we have been referred to numerous authorities, which we have carefully examined and find that they do not sustain the appellant. *Bingo v. Binns*, 10 Pet. 269, decides that an agent to purchase cannot buy for himself; *Oliver v. Piatt*, 3 How. 333 that a trustee cannot convey a title discharged of the trust to a purchaser with notice of the trust; 47 Ills. 114 that one acting in a fiduciary capacity cannot purchase for himself the property. This was a sale of real estate by an administrator who pur-

1. SHERIFF INTERESTED: process, execution of: coroner.

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chased or procured its purchase for himself. 11 Foster (N. H.) 70, 9 Barr 297, 4 Howard 503, are to the same effect.

II. In the case at bar, Gittings, the sheriff, was neither the purchaser nor interested in the purchase. That the bank in which he was a stockholder purchased, did not constitute the sheriff a purchaser. Under a statute of Massachusetts, which substantially provided that no sheriff who was a party to the suit should serve process therein, it was held that a sheriff who had stock in a plaintiff bank was not a party, and could serve the writ, 4 Pick. 405. The same was held in *Adams v. The President, etc. of Wisconsin Bank*, 1 Greenl. rep. 329. The statute was similar to that of Massachusetts. The court distinguishes between stockholders in a banking institution and the inhabitants of *towns*, which in that State and in Massachusetts are *quasi* corporations. "It is well known," says Mellon, J., "that all judgments against *quasi* corporations may be satisfied out of the property of any individual inhabitant, but an execution against a banking company, or any other proper aggregate corporation, cannot be satisfied except out of the corporate fund." The same distinction is recognized in the Massachusetts cases cited in the briefs of counsel, and those relied upon by appellants were suits against *towns*. Sec. 3 page 284 Wagner Stat. provides that the coroner shall execute writs and precepts, and perform all other duties of the sheriff when the sheriff shall be a party, or when it shall appear to the court out of which the process issued, or to the clerk thereof, in vacation, that the sheriff is interested in the suit, related or prejudiced against any party thereto, or in any manner disqualified from acting. It is clear that neither Francis R. Long, the sheriff who made the levy, nor Gittings, the sheriff who sold under the execution, was a party to the suits of the bank *versus* Shrader, and the existence of either of the other facts, which would have devolved upon the coroner the duty to officiate, not having been found by

2. JUDICIAL SALE: sheriff interested.

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the court, or the clerk in vacation, it would hardly be contended, seriously, that in a collateral proceeding the sale could be attacked and defeated by proof that one of those facts existed at the date of the levy or the sale. The relation of trustee and *cestui que trust* does not exist between a corporation and its stockholders. Angel and Ames on Corporation, sec. 13. If it did, we are at a loss to perceive how it would avail appellants here.

III. Appellants contend that plaintiff was not entitled to a judgment, because there was an outstanding deed of trust on the land, and at the date of the trial the debt which it was executed to secure was due and unpaid. A mortgagee, or trustee, or one claiming under him, could make that defence, but not a stranger to the mortgage, holding adversely both to the mortgagor and the mortgagee. This has so often been decided by this court that it has ceased to be an open question. *Woods v. Hilderbrand*, 46 Mo. 284; *Johnson v. Houston*, 47 Mo. 227. Defendants have no connection with the mortgage, but are claiming against it.

3. EJECTMENT: outstanding deed of trust.

IV. The allegations of fraud were not established by the evidence. In fact, what by the answer is charged as such, does not constitute fraud. The bank had a perfect right to have the land sold under the junior judgments, and although Reid may have said that a purchaser would buy under that sale subject to the lien of the oldest judgment, he told the truth, for that, we think, is the law. He also had a right to bid at the assignee's sale, and defendants cannot say that they were misled by Reid bidding, into the belief that they were purchasing a good title, and that Reid and his associates had none, for they were then and there told, as one of them testifies, that Reid and the bank owned that land. They bid to purchase peace, and had a right to bid and buy to avoid the law-suit with the assignee's grantee, without forfeiting their previously acquired right, to a party who, all the circumstances show, knew

4. FRAUD.

5. LAND: conflicting claims to.

what prompted Reid to bid. It is a matter of no consequence whether plaintiff, Hardwick, was a purchaser for a valuable consideration or not. He certainly has as good standing in a court of equity as his grantors would have, and we have seen nothing in the record to invalidate their title, if they instead of Hardwick were plaintiffs. Whether a purchaser for a valuable consideration or not, his conduct in the whole affair is meritorious, for he is endeavoring to save out of the wreck of their father's fortune something for Shrader's children.

6. EJECTMENT: voluntary conveyance.

Judgment affirmed. All concur, except SHERWOOD, J., absent.

AFFIRMED.

CLINE v. BROOKS, ADMINISTRATOR, APPELLANT.

1. **Practice, change of, effect on pending suit:** APPEAL, DEFECTIVE WHEN TAKEN, VALIDATED BY SUBSEQUENT ENACTMENT. Where, by a statute in force at the time of the trial of a cause, certain steps were required to be taken in case of appeal; but between the taking of the appeal and the filing in the appellate court of the transcript in said cause, an act is passed dispensing with this requirement, the appeal is not invalidated by the fact that in taking and prosecuting it the appellant has failed to comply with the requirement.
2. **Appeal, when perfected.** An appeal is not perfected till the transcript is filed in the appellate court.

Appeal from Cass Circuit Court.—HON. F. T. WRIGHT, Judge.

Hall & Givan for appellant.

The transcript of the record and proceedings in the Common Pleas Court was not filed in the circuit clerk's office till the 26th day of March. That court did not in any manner become possessed of the case until that day. Wag. Stat. 120 § 8. Before that, the act of March 17th had become a law (Sess. Acts 1873 pp. 145 to 148); it

repealed the former act and authorized trial *de novo* in the Circuit Court.

R. O. Boggess and *C. W. Sloan* for respondent.

I. There being no motion for a new trial, or in arrest of judgment, filed in said Common Pleas Court; no exceptions saved or error assigned and apparent on the face of the record, it was the duty of the Circuit Court to have affirmed the judgment of said Common Pleas Court. *Davis v. Ware*, 57 Mo. 460; *Clarkson v. Staunchfield*, Ib. 573; *Brown v. Foote*, 55 Mo. 178; *State ex rel. v. County Court*, 51 Mo. 522; *State v. Batchelor*, 15 Mo. 208; *Christy's admr. v. Meyers*, 21 Mo. 112; *London v. King*, 22 Mo. 336; *Walsh v. Allen*, 50 Mo. 181; *Shaw v. Potter*, Id. 281; *Van Cleve v. Gilstrap*, Id. 412; *Moore v. Turner*, 19 Mo. 642; *Bonnott et al. v. Party et al.*, 59 Mo. 98; *Hoppe v. Stone*, 39 Mo. 378; *McCraw v. Hubble*, 61 Mo. 107; *U. S. v. Gamble*, 10 Mo. 459.

II. This cause was tried February 21st, 1873, and on the same day judgment was rendered, an affidavit for an appeal was filed and appeal granted. From that moment the Common Pleas Court ceased to have any control over the case, and, to all intents and purposes, it thereafter belonged to the Circuit Court. The amendatory act was approved March 17th. It must be held to be prospective in its operations only. *State ex rel. v. Thompson*, 41 Mo. 25.

Sherwood, C. J.—The plaintiff had a claim allowed against the estate of Cline, in the Cass Common Pleas, on the 21st day of February, 1873, and on the same day the administrator appealed to the Circuit Court, but the transcript was not filed in the latter court until the 26th of March next thereafter. On the 7th day of July, 1873, the Circuit Court, on the ground that no bill of exceptions, &c., had been filed in the lower court, and no assignment of errors, &c., in that court, dismissed the appeal. After vainly endeavoring to reinstate the cause, the defendant comes here by writ of error.

The court erred in dismissing the appeal; and the cases of *Schulenburg v. Evans, admr.* (59 Mo. 41), and *McCraw v. Hubble, admr.* (61 Mo. 107), are without application here, for the reason: section 23 of the act approved March 4th, 1867, (laws 1867, p. 88) made no distinction between appeals taken, or writs of error sued out, whether relating to probate or other matters; and so it was ruled in *Schulenburg v. Evans, admr., supra;* but that section was greatly modified by the amendatory act which took effect March 17th, 1873, the 19th section of which provides that in "*probate cases,* * * * where the appeal shall be perfected, the Circuit Court shall proceed to try the case *de novo.*" And long before the appeal was perfected, the act of March 17th took effect, making it imperative on the Circuit Court to try the cause anew. And it makes no difference, in consequence of the amendatory act referred to, whether exceptions were saved in the Common Pleas Court or not.

1. PRACTICE, CHANGE OF, EFFECT ON PENDING SUIT: appeal, defective when taken, validated by subsequent enactment.

2. APPEAL, WHEN PERFECTED.

Because of the error committed in dismissing the appeal, the judgment is reversed and the cause remanded. All concur.

REVERSED.

SALINE COUNTY v. BUIE ET AL., PLAINTIFFS IN ERROR.

Creditor's Release of Securities: EFFECT ON SURETY. Release by a creditor of part of the land mortgaged to him as security for payment of a bond, does not discharge a surety in the bond, though made without his consent, if the remainder of the land is sufficient to indemnify him against loss.

Error to Saline Circuit Court.—HON. WM. T. WOOD, Judge.

Samuel Boyd, for plaintiff in error.

Samuel Davis, for defendant in error.

HOUGH, J.—On the 15th day of August, 1868, Thomas M. Smith, as principal with the defendants, D. D. Buie, Samuel Yates and Zebman Smith, as sureties, executed to the county of Saline, for the use of the general fund, and the swamp land fund, a bond for the sum of $1,000, payable on or before the 31st day of December, 1868. At various times prior to the institution of the present suit, payments were made on said bond, aggregating the sum of $864, and this suit was instituted on November 20th, 1873, to recover of the sureties the balance due thereon. Smith was not served and Yates made default. The defendant, Buie, filed a separate answer, alleging that on the same day on which the bond sued on was executed, Thomas M. Smith, the principal therein, for the purpose of securing the payment of said bond, executed and delivered to the County of Saline, a mortgage on two hundred acres of land, conditioned that, in default of payment of either principal or interest, the sheriff of the county should, without suit, proceed to sell the said mortgaged premises. That, on the 10th day of February, 1870, the County Court of Saline County, by an order entered of record, without the knowledge or consent of said defendant, Buie, released from the operation of said mortgage, one hundred and twenty acres of said land, and that said defendant was thereby released and discharged from all liability on account of said bond. To this answer the plaintiff filed a demurrer, which was sustained by the court, and final judgment rendered thereon against said defendant.

We perceive no error in the judgment of the Circuit Court. The demurrer was properly sustained. Conceding that the County Court had authority to release a portion of the mortgaged premises, which we do not decide, the defendant could not complain, unless he was injured thereby, and he failed to allege in his answer any such injury. For aught that appears in the pleadings, the remaining portion of the land mortgaged may be amply sufficient to indemnify him. A surety is entitled to the

benefit of all securities held by the creditor for the payment of the debt of the principal; but when the creditor surrenders or releases a portion only of such securities, the surety is not absolutely discharged, but only to the extent to which he is thereby actually injured. If the securities retained by the creditor are sufficient to pay the debt, the surety is not injured and cannot complain.

The judgment of the Circuit Court will be affirmed. The other Judges concur, except Judge SHERWOOD, absent.

AFFIRMED.

SWEET, ADMINISTRATOR OF JONES, PLAINTIFF IN ERROR, v. MAUPIN.

1. **Probate Court:** JUDGMENT: MUTUAL CLAIMS: EFFECT OF ALLOWANCE. Where there are mutual items of indebtedness between an individual and an estate, a judgment by the county court, allowing the claim of the former against the latter, is not of itself conclusive evidence, that his indebtedness to the estate was adjudicated and deducted in making the allowance.

2. ——: OFFSET: PAROL EVIDENCE. When such a judgment is offered in bar to an action by the administrator to collect the indebtedness due the estate, if it bears evident marks of alteration, parol evidence is admissible to show that it was made not as an absolute judgment, but only as an ascertainment of the amount due from the estate, to be used by way of offset against defendant's indebtedness to the estate.

3. **Judgment:** FRAUDULENT ALTERATION: PAROL EVIDENCE. In such case parol evidence is also admissible to show that the alteration is fraudulent; but it should be very clear and forcible.

4. **Practice:** VERDICT: SEVERAL COUNTS. A judgment on a petition consisting of several counts will not be reversed because the verdict does not contain a separate finding on each count, unless the attention of the trial court was distinctly called to this defect by appropriate motion.

On Motion for Re-hearing.

1. **Formal Defects, patent of record.** No judgment should be reversed for merely formal defects, though patent of record, unless opportune advantage was taken of them in some appropriate way.

2. **Judgment:** PAROL EVIDENCE. Parol evidence is admissible to show that certain matters as to which a judgment is silent, were not adjudicated.

Error to St. Louis Circuit Court.—HON. JAMES K. KNIGHT, Judge.

This suit was brought in the year 1866. It is based on five promissory notes of defendant. The case was here before, and is reported in 47 Mo. 323, when a judgment for defendant was reversed. The only issue presented by the pleadings is, whether the notes were considered and included in an allowance made by the county court in favor of the defendant, in the year 1864, for $3,607.19; the defendant holding the affirmative. There was great conflict of evidence, and it was chiefly directed to two points: *First*—Whether the records of the county court and the account itself, on which was endorsed the amount allowed, had been tampered with, so as to show an absolute allowance in favor of defendant, or whether such allowance was only made as an offset, and so endorsed on the claim and on the rough minutes of the clerk; and, *Second*—Whether the notes were included and considered in the adjustment then made.

T. W. B. Crews, for plaintiff in error, cited: *Society v. Hartland*, 2 Paine, C. C. Rep. 536; *Webster v. Lee*, 5 Mass. 334; *Hibshman v. Dulleban*, 4 Watts (Pa.) 183; *Whittemore vs. Whittemore*, 2 N. H. 26; *Halsey v. Carter*, 1 Duer 667.

Amos M. Thayer, for defendant in error, cited: *Clark v. Han. & St. Joe R. R.*, 36 Mo. 202; *Brownell v. Pacific R. R. Co.*, 47 Mo. 239; *Hickman v. Bird*, 1 Mo. 495; *Jones v. Snedecor*, 3 Mo. 390; *Pratt v. Rogers*, 5 Mo. 51.

SHERWOOD, C. J.—It would indeed be difficult to carefully peruse the voluminous evidence in this case without reaching the same conclusion the jury did in the verdict found for the plaintiff, as the original claim, now before us, shows an evident alteration in the character of the allowance endorsed

1. PROBATE COURT: judgment: mutual claims; effect of allowance.

thereon—an alteration made with such great assiduity, both with pen and eraser, as to scarcely leave the faintest doubt that honest purpose never prompted the significant erasure.

II. Complaint is made that Judge Becker, the presiding justice at the time the claim was allowed, was permitted to state the character of the judgment which was rendered. Ordinarily, of course, such evidence would be clearly inadmissible; but not so under the circumstances of this case. For his testimony, taken in connection with that of other witnesses, was *not* to contradict the record, but to show that fraud, which vitiates everything that it touches, had been employed to defeat the legitimate action of the court over which he presided, and, as expressed in the rough minutes of the clerk, by so changing the entry made thereon, which even defendant's attorney, Crowe, admits was made in a certain way, as to show an absolute unconditional allowance, instead of the allowance of a mere judgment of offset, as shown originally by those minutes.

2. ——: offset: parol evidence.

III. Evidence showing such fraudulent alteration of a record, or any portion thereof, should certainly be very clear and forcible; but this has, in this case, been abundantly furnished, both verbal and written, to show the wrongful change. And should we refuse to receive it, we, by our own ruling, would only pave the way for repeated forgeries of this sort. No error is perceived in this regard, nor do we discover any error in the instructions given on the part of the plaintiff.

3. JUDGMENT: fraudulent alteration: parol evidence.

The third instruction told the jury that the verdict of allowance was not conclusive evidence in and of itself, that the note sued on had been adjudicated and passed upon by the county court at the time the allowance was made, and this accords with our former ruling, when this case was here before. Objection is made to the first and second instructions, which, in effect, told the jury to find in favor of plaintiff, unless they believed, from the evidence, that

the notes sued on were passed upon and adjudicated at the time the allowance in favor of defendant was made; because these instructions farther told the jury, in the event of thus finding for plaintiff, to deduct from the aggregate amount of the notes and interest the amount of the allowance, and bring in a verdict for the residue. We do not see what prejudice these instructions could work to defendant; for plaintiff was entitled to recover, if at all, for the full amount of the notes and interest, while these instructions diminish the recovery by the amount of the allowance. If the plaintiff had recovered the full amount of the notes and interest, it is clear that defendant would not have been able to have enforced his claim against the estate until the larger judgment of the plaintiff was first satisfied, so that the only effect of these instructions, if obeyed by the jury, and it would seem they were, was to accomplish a present adjustment between the parties.

IV. A more serious objection is made to the verdict, which was for $1,197.16, on the ground that the finding is a general one, and not a finding on each count of the petition. For repeated decisions of this court have settled the matter that when the attention of the lower court has been called to a defect of this sort, by appropriate motion, a reversal must occur, if such motion be overruled. But on examination of the motion for new trial, in the present instance, it will be found that, although the ground referred to is distinctly set out in the assignment of errors at general term, yet that the motion does not distinctly specify the ground now urged, the nearest approach to such specification being the fourth clause, that "the verdict of the jury is not warranted by the issues in the case, and is *incorrect* and *informal*." Our statute expressly requires that motions shall distinctly specify the ground whereon they are based (2 Wag. Stat. 1,021 sec. 48.) The object of this is to call the attention of the lower court to the point complained of. For mere matters of exception cannot be noticed here except when "expressly decided"

4. PRACTICE: verdict: several counts.

by the lower court (Id. 106 sec. 32; *State v. Rucker*, 59 Mo. 17; *Brady v. Connelly*, 52 Mo. 19; *Chapman v. White*, Id. 179; *Burns v. Whelan*, Id. 520; *Carver v. Thornhill*, 53 Mo. 283.) We hardly think, in the light of these statutory provisions and decisions, the motion before us specified with sufficient distinctness the ground now relied on, that the verdict did not contain a special finding on each count. But even if the motion had been sufficiently specific in the particular mentioned, we should be very loth to reverse on that ground, under the particular circumstances of the case at bar. For it seems quite evident that the jury found in favor of the plaintiff on all the counts in the petition, and then, in obedience to instructions, deducted the allowance in favor of the defendant, and gave a verdict for the residue. The amount of their verdict would appear to indicate this. In addition to that, the judgment is evidently for the right party. This is the eleventh year of this litigation; no useful purpose can be subserved by allowing it to continue longer, since the trial below was fairly conducted, and the practical result reached would doubtless be the same were the cause remanded. Taking all these matters into consideration, we do not feel at liberty to take such action as will disturb the judgment of the lower court. For we are expressly prohibited from reversing the judgment of any court, unless believing that error was committed "materially affecting the merits of the action" (2 Wag. Stat. 1,067 sec. 33).

Therefore, we shall reverse the judgment of reversal rendered by the general term, and affirm the judgment of the special term, in favor of the plaintiff. All concur.

AFFIRMED.

On Motion for Rehearing.

L. F. Parker for the motion.

I. A judgment of a court of competent jurisdiction cannot be attacked in a collateral proceeding for fraud,

but only by a direct proceeding for that purpose. *Christmas v. Russell*, 5 Wall. 290; *Granger v. Clark*, 22 Maine 128; *Freeman v. Thompson*, 53 Mo. 183; *Atkinson v. Allen*, 12 Vt. 624; *McRae v. Matoon*, 13 Pick. 53; *Krekeler v. Ritter*, 62 N. Y. 372; *Anderson v. Anderson*, 8 Ohio 108; *Smith v. Smith*, 22 Iowa 516; *Smith v. Keen*, 26 Me. 411. And then it must be specially pleaded. *Whetstone v. Whetstone*, 31 Iowa 277; *Commonwealth v. Trout*, 76 Pa. St. 379; *Hulverson v. Hutchinson*, 39 Iowa 316; *Edgell v. Sigerson*, 20 Mo. 494; *Kerr, Fraud and Mistake*, 365 *et seq.*; 2 *Whart. Evidence*, §§ 982, 984; 1 *Greenleaf Evidence*, §§ 51, 52, 448; 1 *Ves. Ch.* 287; *Sibson v. Edgeworth*, 2 Deg. & Sm. 73; *McMurray v. Gifford*, 5 How. Pr. 14.

II. The verdict is fatally defective, and the defect being patent of record, must be judicially noticed by this court.

Per Curiam.—Relative to the point that the verdict was a *general* one, while the petition contained five counts, we have this to say, in addition to what has already been said thereon in the foregoing opinion: Repeated decisions of this court have *conclusively established* that we will not reverse because there was not a finding on each count, unless the attention of the lower court was specifically called to the matter by appropriate motion, and in the original opinion we cited several authorities to show this. *State v. Rucker*, 59 Mo. 17; *Brady v. Connelly*, 52 Mo. 19; *Chapman v. White*, Id. 179; *Burns v. Whelan*, Id. 520; *Carver v. Thornhill*, 53 Mo. 283. All of these cases show that motions must *distinctly specify* the grounds relied on, and therefore bear with more or less directness on the point in hand, if the statute (2 Wag. Stat. 1021 § 48) in such cases made and provided is to be *obeyed;* and the case of *Chapman v. White* is *directly* in point, deciding, as it does, that if "no such reason was given in the motion for new trial, or in arrest, we cannot consider it here." These cases, and the section of the statute whereto we made reference, seem to have wholly escaped the attention of counsel. But these

authorities on the point by no means stand alone. In *Fickle v. St. L., K. C. & N. R. R. Co.*, 54 Mo. 219, this language is used: "The only remaining point insisted on by the defendant, as a ground for a reversal of the judgment is, that the court rendered a general judgment in the case on all the counts in the petition, without making a separate finding on each count. *It has been frequently held by this court, that such irregularities, committed in the trial courts, will not be noticed in this court, unless the matter has been specifically brought to the attention of the trial court by motion or otherwise.*" The motion for a new trial, in this case, did not call the attention of the court to this objection. The only thing that approached such objection was, that "*the finding, or verdict, is not specific or proper.*" This is not sufficient. If the objection had been made to the trial court, that there was no separate finding on the several counts in the petition, the court, having tried the cause without a jury, would doubtless have corrected its finding, and the defendant would have had no cause to appeal to this court to have the finding corrected or the judgment reversed. To the like effect is *Gilmore v. St. L., K. C. & N. R. R. Co.*, in the same volume, p. 227. In *Pitts v. Fugate*, 41 Mo. 405, the point that the petition contained several counts, and that there was no separate finding as to each, was expressly called to the attention of the trial court by motion in arrest. In *Brownell v. P. R. R. Co.*, 47 Mo. 240, and in *Mooney v. Kennett*, 19 Mo. 551, the question of the necessity of calling, by proper motion, the attention of the lower court to a defect of the sort now complained of, was not considered. In *Clark's admr. v. Han. & St. Joe R. R. Co.*, 36 Mo. 215, the motion in arrest expressly raised the question respecting a *general* verdict on several counts. In *State v. Dulle*, 45 Mo. 269, it does not appear whether there was any motion filed or not. In *Jones v. Tuller*, 38 Mo. 363, the petition did not contain a "statement of a legal cause of action;" and the same may be said of *State v. Matson*, Id. 489. In *Nordmanser v. Hitchcock*, 40 Mo., 178 the

"error apparent on the face of the record" was in allowing the defendant to recover on his counter-claim, in the absence of the plaintiff, instead of dismissing the suit for lack of prosecution. In *Han. & St. Joe R. R. Co. v. Mahoney*, 42 Mo. 467, the question—a *jurisdictional* one—was a fit subject for inquiry, for the first time in this court, notwithstanding no motion was filed below, and *this* is all that case decides. The *State v. Marshall* was a criminal case, and therefore occupied a different footing than *civil* cases. In *Bateson v. Clark*, 37 Mo. 31, the petition was alleged to be "fatally defective and insufficient to charge the endorsers," and for that reason its sufficiency was examined. The doctrine announced in *Peyton v. Rose*, 41 Mo. 257, and *Gray v. Payne*, 43 Mo. 203, has been exploded. But at the time these decisions were rendered, it was regarded a *fatal* defect to seek in one and the same proceeding to set aside a conveyance for fraud, and also obtain possession of the land. It will thus be observed that the original opinion is in full accord with former decisions by us noted (*Chapman v. White, Fickle v. St. L., K. C. & N. R. R. Co., Gilmore v. St. L., K. C. & N. R. R. Co., supra*), and is not directly opposed by any. None of those cited by defendant's counsel, as we have clearly shown, going further than to hold that we should review the action of the lower courts, in the absence of appropriate motions, only where the defect "apparent on the face of the record" is *fatal* in its character; and we have been at the pains to review the authorities cited in behalf of defendant, in order to correct the serious misapprehension into which counsel have fallen, that for *every error apparent of record the judgment should be reversed.* Neither our Practice Act, nor our numerous decisions made thereon, give the slightest support to such an idea. There are doubtless numerous opportunities for fatal errors to occur, between the filing of the pleadings and the rendition of judgment. Our statute, however, has only seen proper to specify *two;* one, that the petition "does not state facts sufficient to constitute a cause of action," and

the other, the lack of "jurisdiction of the court over the subject matter of the action." Aside from these, so far as concerns the petition, unless objection thereto be taken either by demurrer or answer, "the defendant shall be deemed to have waived the same" (2 Wag. Stat. 1015 § 10; *Pomeroy v. Benton*, 57 Mo. 531, and *cas. cit.*) so that it will be readily seen that many defects, regarded as fatal at common law, are not of serious importance under our code practice, and cannot be taken advantage of except at the *proper time;* otherwise, they are deemed to be *waived.*

1. Formal defects, patent of record.

We take it, then, from a review of the authorities, and of our liberal statutory provisions, that, *even for error apparent of record*, a reversal of the judgment does not, in all instances, necessarily and as a *matter of course*, occur. Certainly not, as shown by the authorities we have cited, for errors of the sort being considered: errors occurring during the progress of the trial, unless an appropriate motion gives opportunity for their correction, by *pointedly* calling attention of the trial court to them. In short, the theory of our Practice Act, as we understand it, is that for mere *formal* defects, though patent of record, reversals should not occur, unless opportune advantage be taken thereof in some appropriate way. This view is in entire consonance with that section of the statute (§ 33, 2 Wag. Stat. 1067) which expressly inhibits a reversal, unless "error was committed materially affecting the merits of the action."

2. Judgment: parol evidence.

Passing to the other point urged upon our attention in the motion: It will be borne in mind that the issue raised by the pleadings was whether the notes sued were considered and included in the allowance obtained by Maupin. That allowance was not *conclusive* that the notes in controversy were considered and included when the allowance was made. This was so ruled when this case was here before (47 Mo. 323); and other decisions of this court also establish that parol evidence may be introduced, not to contradict the record, but to show that

certain items and matters, as to which the record is silent, were not adjudicated. Any evidence was competent, therefore, to show this, even if such evidence *incidentally* showed that *fraud* had been committed, by changing the official entries which the law requires the clerk to make in his abstract and to endorse on the claim at the time of the allowance. (§§ 27, 28, 1 Wag. Stat. 105).) This is not attacking the record on the ground of fraud, any more than it is attacking the verity of the record, by showing that certain matters were not passed upon when a certain judgment was rendered.

The motion for rehearing is therefore overruled.

OVERRULED.

STALEY v. IVORY ET AL., APPELLANTS.

1. **Pleading:** DEFECTIVE TITLE: FRAUD: RESCISSION. In an action on a promissory note given for the price of land, an answer averring failure of consideration in consequence of a defect in the title and fraudulent representations, is insufficient, if it fails to state in what the defect consists, whether a deed has been delivered and the nature thereof, whether the means of information were not equally open to both parties, and whether plaintiff agreed to deliver possession, and makes no offer to rescind the contract.

2. **Married Woman:** SEPARATE ESTATE: JUDGMENT: PRACTICE. In an action against a married woman and her trustee, to enforce a demand against her separate estate, no relief being asked against her husband, the decree should go against the wife and the trustee only, though the husband is made a co-defendant in obedience to the statute.

Appeal from St. Louis Circuit Court.—HON. JAMES K. KNIGHT, Judge.

Donovan & Conroy, for appellants.

Kehr, Tittman & Tittman, for respondents.

As the pleader has not averred that the land was conveyed to Mrs. Ivory with covenant of warranty, the presumption must be, that it was conveyed without such covenant. Therefore, the existence of incumbrances, or a defect in title, constitutes no failure of consideration. If the court should assume that the land was conveyed with covenant of warranty, the answer still is bad—because no eviction is shown, or breach of the covenant alleged, and hence there is no failure of consideration. *Hay v. Taliaferro*, 8 Sm. & M. 727; *Dennis v. Heath*, 11 Sm. & M. 206; *Rawle on Covenants*, 645, American Note 1. To plead a defect of title, without an offer to reconvey the property, is insufficient. Plaintiff must either have the property back, or his purchase money.

As the property was settled to the sole and separate use of Mrs. Ivory, to the exclusion of the marital rights of her husband, he had no interest in the controversy to be either recognized or ignored. Neither did plaintiff ask any relief against him. He was simply made co-defendant only because of his relation as husband.

SHERWOOD, C. J.—The plaintiff sues to subject the separate estate of the wife, B. M. Ivory, to the payment of certain promissory notes which she had given for a piece of land. The husband, and also the trustee, in whom was vested the legal title of the real estate sought to be charged, were made parties defendant. It is difficult to characterize in fitting terms the answer filed on behalf of the wife. Failure of consideration, in consequence of a defect in the title of the land purchased, fraudulent representations in regard thereto, and the damages arising therefrom, are all blended together. But the answer does not state in *what* the alleged defect in the title consisted, nor whether a deed had been delivered, or the nature thereof, nor whether the means of information were not equally open to both parties, nor is there any offer to rescind the contract. And as

1. PLEADING: defective title: fraud: rescission.

to the possession of the premises, nothing is shown in the answer that plaintiff agreed to deliver possession. The answer was held insufficient on demurrer, and no further pleading being filed, judgment went as prayed in the petition. We discover no error in the action of the lower court; it is the duty of the pleader to so state his defense as that the same may be readily understood, both by the court and the adversary. This, as above seen, was not done in this case, though opportunity was afforded, by proper amendment, to have made that clear and definite, which before was vague and unintelligible. We will not, therefore, narrowly scan the answer, held insufficient, to see if some faint semblance of a defense may not by an unexpected possibility be discovered to exist therein. *Lincoln v. Rowe*, 64 Mo. 138.

II. As to the husband, he was only made a party defendant because the statute required it. No relief was asked as to him, and the court acted correctly in entering a decree against the wife and trustee alone, which merely subjected the land of the wife to the payment of the notes.

2. MARRIED WOMAN: separate estate: judgment: practice.

Judgment affirmed. All concur.

AFFIRMED.

STATE EX REL. MCGRATH AND MERCER, RELATORS, V. HOLLADAY, STATE AUDITOR.

1. **State Treasury**: APPROPRIATION: WARRANT: BOARD OF EQUALIZATION. Members of the State Board of Equalization are not entitled to warrants on the treasury for services performed, when there are no funds appropriated to pay for such services.
2. **Mandamus.** In mandamus no relief will be granted but that specifically prayed by the petitioner.

Mandamus.

M. K. McGrath for relators.

J. L. Smith, Atty. Gen., for respondent.

HENRY, J.—This is a proceeding by mandamus to compel Thomas Holladay, State Auditor, to audit the account of petitioners for their services as members of the State Board of Equalization for the year 1876, and to issue to them respectively warrants on the State Treasurer for the amounts. No objection having been made to the joinder of petitioners in this proceeding, we shall not notice that defect in the petition. No appropriation having been made by the last General Assembly for payment of the members of the State Board of Equalization for services in the year 1876, and that made by the preceding General Assembly for that purpose having been exhausted, the Auditor is not authorized to draw warrants on the Treasury in their favor. And this being the specific relief sought by petitioners, the peremptory writ will be refused. *The State ex rel. Missouri State Board of Agriculture v. Holladay, State Auditor*, 64 Mo. 526. We are not at liberty to grant any relief but that asked, and as that is refused it would be improper to consider the question of the right of the members of that board to the compensation for their services allowed by law to the persons consituting the board prior to the adoption of the new constitution in 1875. Peremptory writ refused. All concur, except NORTON, J., not sitting.

REFUSED.

American Insurance Co., Appellant v. Klink

Insurance: PREMIUM NOTE: FAILURE TO PAY INSTALLMENT: SUSPENSION OF RISK: POLICY TO RE-ATTACH ON PAYMENT: WHAT THE INSURER MAY RECOVER: PAID-UP POLICY. Where the charter of an insurance company provides that the whole of a premium note payable in installments shall become due upon failure to pay any installment for thirty days after notice given to the maker of the default and the penalties incurred under the charter by reason thereof; and by the charter and a policy issued thereunder, such failure does not absolutely avoid the policy, but suspends it so that the company is not liable for a loss occurring during the continuance of such default, but upon the payment of the note (whether voluntary or enforced) the policy revives and re-attaches; in such case the company may recover the full amount of the note, and not merely such part as would bear the same proportion to the full amount as that portion of the period of the risk prior to the notice of default bears to the entire period covered by the policy. Upon payment of the full amount the insured becomes the owner of a paid-up policy for the remainder of the original term.

Appeal from Moberly Court of Common Pleas.—Hon. G. H. Burkhardt, Judge.

Rouse & Hollis, for appellant.

1. The note, application and policy form the contract between the parties, and being drawn in conformity to the company's charter, constitute a legal and binding contract. Opinion of Drummond, J., in *Payson v. Withers*, United States Circuit Court, District of Minnesota, June Term, 1873; *American Ins. Co. v. Gallaher*, 50 Ind. 209; *Williams v. Albany City Ins. Co.*, 10 Mich. 451. The whole contract must be taken together to find the intent of the parties, and not a particular clause. *Shuetze v. Bailey*, 40 Mo. 69.

2. The contract thus formed was for five years' insurance, and not for one year at a time. And being voluntarily entered into, the parties were bound thereby. *Keim v. Home Mut. Ins. Co.*, 42 Mo. 38; *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 283; *Webb v. Protection Ins. Co.*, 14 Mo. 3.

3. The provisions in the charter, the policy and the application are all harmonious with each other. Taken together, they provide, both as *matter of law* and as *matter of contract*, that if an installment of premium should be suffered to remain due and unpaid more than thirty days, the risk should be suspended, the whole note become due, and the company should have the right to sue and collect. *Wall v. Home Ins. Co.*, 36 N. Y. 157. And on payment of the same, voluntarily or otherwise, the policy to attach. Can it then be possible that the intention of the parties was to allow the respondent, at his pleasure, to terminate the contract, and that by violating his own solemn obligation, thereby accomplishing by unlawful means what he could not by lawful means? The policy expressly provides that the contract shall not be terminated by respondent except by actual transfer of the property. *Clark v. Condit*, 11 Mo. 79.

4. Where a policy stipulates that it shall be void if premium is not paid at maturity, it is optional with the *company* to *declare* it void. *Mut. Ben. Life Ins. Co. v. French*, 2 Cin. (Ohio) 321; *Pennsylvania Ins. Co. v. Geraldin*, 31 Mo. 20; *Joliff v. M. M. Ins. Co.*, 39 Wis. 111; and not optional with the insured to terminate the contract, and that by violating it himself.

5. Respondent relies on *Penn. Ins. Co. v. Geraldin*, 31 Mo. 30. The company, in that case, cancelled the policy, and then sued for the whole year's premium. The policy was thus declared dead by the company, never to be revived. In the case at bar, the contract shows plainly that there is only a *suspension* of insurance, while the insured is permitted to carry the money belonging to the company. It is in his power, by the terms of the contract, to avoid the suspension entirely, or to force the policy to attach at any moment, and that by only doing his legal and moral duty.

Crawley & Rothwell, for respondent.

1. By the terms of the policy itself, failure to pay any

installment worked a forfeiture of the policy at the expiration of thirty days from the time such installment became due, and the appellant is not entitled to recover the whole note, but only "so much of the premium as bears the same proportion to its full amount of the admissable period of the risk (which in this case is thirty days) does to the entire period originally covered by the policy, viz: five years." *Penn. Ins. Co. v. Geraldin*, 31 Mo. 30.

2. The contract of insurance, by mutual agreement inserted in the policy itself, being rescinded on a failure to pay any installment, both parties are released. *Alliance Mut. Ins. Co. v. Swift*, 10 Cush. 433.

Hough, J.—The plaintiff insured the defendant, on the installment plan, against loss or damage by fire and lightning, to the amount of $1,660, on a certain dwelling house and other property, situated in Randolph County, for the period of five years, from and after the 26th day of October, 1872. The defendant paid as premium the sum of $9.96 cash, and gave his note for the sum of $39.84, payable in four annual installments. The application made and signed by the defendant contained the following stipulation: "If any installment upon the premium shall remain due and unpaid thirty days, then the policy issued upon the application, in consideration of such installment, shall be null and void, until the same is paid."

The charter of the plaintiff authorizes the taking of installment notes, and contains the following provisions: "If the maker of such note or notes shall neglect or refuse to pay the amount of any installment for the space of thirty days after the same shall fall due by the terms of such note or notes, then, and in every such case, the policy issued in part or whole consideration of such note or notes, shall be null and void until the same is or are paid, and if any person or persons owing such note or notes, shall refuse to pay any installment for the space of thirty days after the same shall fall due, notice having been given by mail or

otherwise, of the maturity of such note or notes, and of the penalty and forfeitures herein provided, then, and in every such case, the whole note upon which installment is or are due, shall become due and payable, and the said company may proceed at law and collect the whole note or notes given for and in consideration of any policy of insurance, with costs of suit. Upon the satisfaction of any judgment, the policy issued in whole or part consideration of any note or notes upon which suit is brought, shall become in full force and virtue."

The policy issued to the defendant contained the following clauses: "This company shall not be liable for theft at or after a fire, &c." "Nor, if default shall have been made by the assured in the payment of any installment of premium due upon the installment note aforesaid of the assured, for the space of thirty days after such installment shall become due by the terms of such note; provided, however, that on payment by the assured or assigns of all installments of premiums due under this policy and the installment notes given thereon, the liability of this company on this policy shall again attach, and this policy be in force from and after such payment. But this company shall not be liable for any loss happening during the continuance of such default of payment. If the interest of the assured is not properly stated, &c., or if the cash premium shall be unpaid, then, and in every such case, this policy shall be void. When a promissory note shall be given by the assured for the cash premium, it shall be considered a payment; provided, such note is paid at or before maturity. But it is expressly understood and agreed by and between the parties hereto, that should any loss or damage occur to the property hereby insured, and the note given for the cash premium, or any part thereof, remain unpaid and past due at the time of such loss or damage, then this policy shall be void. It is further provided that no attempt by law or otherwise to collect any note given for the cash premium or any installment of premium due

upon any installment note, shall be deemed a waiver of any of the conditions of this policy, or shall be deemed in any manner to revive this policy. But upon the payment by the assured or his assigns of the full amount due upon such note, and costs, if any there be, this policy shall thereafter be in full force."

The plaintiff was duly authorized to do business in this State. The first installment, which fell due in 1873, was paid. Default was made in the payment of the second installment, and after thirty days' notice to the defendant, as required by the charter which was referred to in the policy and made a part thereof, plaintiff brought suit to recover the whole amount of said note remaining unpaid. No loss had occurred prior to the institution of the suit, nor, as far as appears, prior to the judgment.

The only question presented is, whether, on the facts stated, the plaintiff was entitled to recover the full amount of the note, or only such part thereof, as would bear the same proportion to the full amount, as that portion of the period of the risk prior to the notice of default bears to the entire period covered by the policy. The rule allowing only a proportionate amount to be recovered was adopted by the court, and judgment was rendered for the plaintiff for the sum of one dollar, from which an appeal has been taken to this court. The case of the *Pennsylvania Ins. Co. v. Geraldin*, 31 Mo. 30, is relied upon by the defendant to sustain the judgment of the court below. There is a very marked difference, however, between that case and the case at bar. In that case, the failure of the insured to pay the premium note rendered the policy absolutely void, at the option of the company, and the policy was declared to be void and of no effect from that date, and the company was restricted to a recovery of such part of the premium as was proportioned to the diminished period of the risk. In the case at bar, the failure to pay an installment of the note did not, at the option of the company or otherwise, absolutely annul or avoid the pol-

icy, but only suspended it during the continuance of such default, so that if a loss had occurred during the default of the insured, no recovery could be had therefor against the company. But upon the voluntary or enforced payment of the note, if no loss had occurred, the policy would revive and re-attach. The only effect of a default and notice, no loss occurring, was to entitle the company to sue for and recover the entire amount of all the installments, thereby giving the insured, when the sum so recovered was paid, a paid-up policy for the remainder of the original period of five years. Similar stipulations were elaborately considered in the case of *Williams v. The Albany City Ins. Co.*, 19 Mich. 451, and declared to be valid, and we perceive no reason why they should not be upheld in the case at bar.

We express no opinion as to the effect, under the terms of this policy, of a loss occurring after the default and before the recovery of the amount of the premium note, as no such case is before us.

The judgment will be reversed and the cause remanded. The other judges concur.

REVERSED

STATE OF MISSOURI v. HILL, APPELLANT.

1. **Evidence:** POSSESSION OF STOLEN PROPERTY. Recent possession of stolen property is in presumption of law guilty possession.
2. **Indictment:** PROOF: VARIANCE. An indictment charging the stealing of a gray mare mule is supported by evidence that the animal stolen was an iron-gray mare mule, or a dark iron-gray mare mule.
3. **Evidence:** ADMISSIONS. When the prosecution offers in evidence a conversation of the accused, consisting of admissions criminating himself and statements favorable to himself, the jury must consider the whole together. The law presumes that the former are true. The jury may believe or disbelieve the latter as they may appear to be true or false.
4. **Instructions,** are properly refused, which amount to a commen on the evidence or a repetition of others already given.

Appeal from Lafayette Criminal Court. — HON. WM. H. H. HILL, Judge.

Clayton & Callahan for appellant.

J. L. Smith, Att'y Gen., for the State.

NORTON, J.—The defendant was indicted in the Circuit Court of Lafayette County at its November Term, 1874, for grand larceny in stealing one gray mare mule, the property of John Haeder. The cause was properly certified and transferred from said court to the Criminal Court of said county, in which court it was tried at the March Term, 1876, and a verdict of guilty returned, and the punishment assessed at three years' imprisonment in the penitentiary. Defendant's motion for a new trial being over ruled, he brings the cause to this court by appeal. The errors assigned in the motion are that the court erred in giving improper and refusing to give proper instructions; in admitting illegal and refusing to admit legal evidence; that the verdict was against the evidence; and that one of the jurors after the trial had said that fifty dollars had been paid by the defence to one Powers or Bowers, a witness in said cause, not to appear and testify, and that said juryman knew this at the time he was acting as juryman in said cause and before a verdict was rendered.

I. The instructions given and objected to are as follows: 1. "The court instructs the jury that recent possession of stolen property is in presumption of law guilty possession, and if the jury believe from the evidence that defendant had possession of the mule alleged in the indictment to have been stolen at the house of one Patrick Lillis recently after the same was stolen, then such possession was guilty and unless explained by the evidence in the case to the satisfaction of the jury they shall find him guilty as charged." 2. That though the indictment describes the stolen property as a gray mare mule, and though the evidence may show that the stolen property was an iron gray mule or a dark iron gray mare mule, the variance in that particular is immaterial, and if from the evidence the jury believe that the defendant did on or about the 7th day of May, 1874, feloniously take, steal and carry away a dark iron gray mare mule belonging to the said John Haeder, the jury shall find the defendant guilty as charged." 3. "In considering what the defendant said the jury must consider it all together. He is entitled to the benefit of what he said for himself if true, as is the State to the benefit of what he said against himself. In any conversation proved by the State, what he said against himself the law presumes to be true because against himself, but what he said for himself the jury are not bound to believe because said in a conversation proved by the State. They may believe it or disbelieve it as it may be shown to be true or false by the evidence in the case."

1, EVIDENCE: possession of stolen property.

2. INDICTMENT: proof: variance.

3. EVIDENCE: admissions.

II. The following instructions asked by the defendant were refused: 1. "That to authorize a conviction in this case it is not sufficient to prove that the gray mule left by the defendant at the place of Patrick Lillis resembled the mule of said Haeder, but the jury must believe and find from the evidence that said mules have been identified to be one and the same mule, and unless said mules have been so identified, or if the jury have a reasonable doubt as

to the identity of said mules, they will find the defendant not guilty. 2. The jury are instructed that they may from circumstantial evidence alone find the defendant guilty, when the facts established are inconsistent with any other theory than that of his guilt, but in order to find the defendant guilty from circumstantial evidence the facts proven must be wholly inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and before the jury can find the defendant guilty they must believe and find from the evidence that the circumstances proven in the case are not only inconsistent with the innocence of the accused and reconcileable only upon the ground of his guilt, but they must further find that no satisfactory explanation of said circumstances has been rendered by the evidence of defendant." 3. That in taking into consideration the conversations as testified to by said John Haeder as having occurred between himself and the defendant, the jury will take into consideration the entire conversation and all that was said at the time and the circumstances surrounding the parties at the time; and the jury will consider as to whether or not the proposition as stated to have been made by the defendant, that his brother would give said Haeder a mule or a horse if he would drop the matter, were made on the part of the defendant to avoid the disgrace of a prosecution and the cost and trouble attached to it, or to cover up his guilt, or as to what, if any other, motives prompted the defendant to make such proposition.

III. The first of the above instructions given for the State has been declared to be the law and has been sanctioned by this court in a large number of cases. 27 Mo. 463; 15 Mo. 168, 349; 38 Mo. 372. The second instruction is objected to on the ground that the indictment charges the defendant with stealing a gray mare mule and that the court tells the jury that this charge is supported by proof showing that the mule stolen was an *iron*

gray or a *dark iron* gray mare mule. The variance between the allegation and proof, we think, is immaterial: in either case the mule would be a gray mule, although in the one case it would be an iron gray, in the other a dark iron gray. Such particularity of description is not required. It is sufficient if the property stolen be described so that a conviction or acquittal may be pleaded in bar in subsequent prosecution. Under an indictment charging that the property stolen was a gelding, proof that it was a horse will support the charge. *State v. Donegan*, 34 Mo. 67. The third instruction complained of is an exact transcript of an instruction expressly approved by this court in the case of the *State v. Carlisle*, 57 Mo. 106.

IV. The principle which defendant sought to have declared in the first instruction refused by the court was
4 INSTRUCTIONS. given in the following instruction: "The court instructs the jury that by the indictment in this cause the defendant is charged with grand larceny in having on the 14th day of May, 1874, feloniously stolen, taken and carried away one gray mare mule, the property of one John Haeder; and before the jury can find the defendant guilty they must believe and find from the evidence that said mule was so stolen; and they must further believe and find from the evidence as above that defendant Willis Hill did so steal, take and carry away said mule, and unless the jury so find they will find defendant not guilty." The above declaration having been given, the first instruction, containing a repetition of it and also a comment as to the sufficiency of proof, was properly refused. The refusal of the second instruction was rightful because the court gave the following, correctly stating the law as applied to circumstantial evidence: "The jury are instructed that they may from circumstantial evidence alone find the defendant guilty when the facts established are inconsistent with any other theory than that of his guilt, but in order to find the defendant guilty upon circumstantial evidence the facts proven must be wholly inconsistent with the innocence of

the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt." With this instruction given, which is a clear declaration of the law upon the subject of which it speaks, we cannot see that error was committed in refusing the instruction as asked. The third instruction being in the nature of comment on the evidence, and the jury having been previously instructed to take into consideration all that defendant said in the conversation alluded to, was rightfully refused. In looking through the record, both as to the instructions given and refused and the admission of evidence, we have been unable to discover any material error affecting the rights of the defendant.

V. The reason for a new trial based upon the alleged statement of a juror after the verdict was rendered, that fifty dollars had been paid by the defence to procure the absence of a certain witness in said cause, and that he knew this fact at the time he was acting as a juryman and before a verdict was rendered, disappears in the face of the affidavit of the juror to whom the expression was imputed, who swears that he had made no such statement and had never heard of such fact until after the verdict was rendered and the jury was discharged. The truth of this matter was investigated by the trial court on affidavits, and no cause is seen to exist for interfering with the discretion of the court in refusing a new trial on this ground. Judgment affirmed. All the judges concur.

AFFIRMED.

WHEELER & WILSON MANUFACTURING COMPANY, PLAINTIFF IN ERROR, v. GIVAN.

1. **Agent to sell:** IMPLIED POWERS. An agent authorized to sell goods on commission has no implied power to barter or exchange them, or to pledge them for his own debt. He may receive payment in the ordinary modes of business, but cannot change the security for goods sold, or make himself the debtor of his principal in lieu of the purchaser.

2. **Case Adjudged.** In suit upon a note given for the purchase money of a sewing machine bought of plaintiff's agent, it is no defence that the maker has furnished board to the agent in payment of the note under an agreement made at the time of the sale, where it appears that the maker had notice that the agent was not authorized to make such agreement and the plaintiff never consented to it.

Error to Cass Circuit Court. — HON. F. P. WRIGHT, Judge.

Boggess & Sloan and R. F. Railey for plaintiff in error.

1. An agent to sell is not authorized to barter or dispose of his principal's goods or property in any unusual manner. *Benny v. Rhodes*, 18 Mo. 147.

2, The board furnished to Moore, the agent, cannot be treated as a payment. He could receive nothing but money in payment, unless otherwise expressly directed, or that power might be deduced from the habits of the parties or the customs of the trade. Story on Agency, 6th Edition, sections 98, 181, 215, 413, 429, 430; *Buckwalter v. Craig*, 55 Mo. 71; Wharton on Agents, sec. 210.

3. No antecedent or contemporaneous verbal stipulations or agreements between the contracting parties can be admitted in evidence to contradict or vary the terms of a written contract. *Helmrichs v. Gehrks*, 56 Mo. 79; *Murdock v. Ganahl et al*, 47 Mo. 135; *Cockrill v. Kirkpatrick*, 9 Mo. 688; *Woodward v. McGaugh*, 8 Mo. 161; *Singleton v. Fore*, 7 Mo. 517; *Lane v. Price*, 5 Mo. 101; *Ashley v. Bird*, 1 Mo. 640; *Kochring v. Mumminghoff*, 61 Mo. 407; *Forsyth v. Kimball*, 91 U. S. 291; *Heywood v. Perrin*, 10 Pick. 228.

4. A party dealing with an agent of limited power, and making a contract beyond the authority of the agent with knowledge of such limitation of authority, cannot hold the principal bound thereby. Story on Agency, 6th Edition, secs. 73, 127, 133, 68, 98; 1 Parsons on Contracts, 3d Edition, page 41, note t, and authorities there cited. *Tate v. Evans*, 7 Mo. 419; *Goodman v. Simonds*, 19 Mo. 106. 1 Am. Leading Cases, 5th Edition, marginal page 561, top page 680 and note 1; *Flanagan v. Alexander*, 50 Mo. 51; *Hoffman v. John Hancock Mutual Life Ins. Co.*, *Chicago Legal News*, May 27, 1876; s. c. 3 C. L. J. 448.

Hall & Givan for defendant in error.

1. The agent had the machines in his possession, had power to sell them and receive pay for them, to collect notes before given for machines—in short, make any and all contracts in reference to the sale of machines. No limit to his agency anywhere appears. It was competent for him to make such a contract as he did make with defendant. The agreement to take part of the pay for the machine in board was an inducement to defendant to buy the machine. It was a part of the *res gestae*. The authority of an agent need not necessarily be proved by an express contract, but may be proved by the habit and course of business of the principal, and if a man holds out another as his agent, and thus induces persons to deal with him as agent, the principal is estopped as to such third parties from denying the agency by which such agent has been transacting such business. *Brooks v. Jameson*, 55 Mo. 505.

2. The power to sell includes the power to receive payment, and a party who is intrusted with the possession of goods to sell them is also entitled to receive payment. Story on Agency, Sec. 102. *Johnson v. McGruder*, 15 Mo. 365; *Sumner v. Saunders*, 51 Mo. 89; *Brooks v. Jameson*, 55 Mo. 505; *Rice v. Groffman*, 56 Mo. 434; *Lumley v. Corbett*, 18 Cal. 494.

3. Whenever one of two innocent parties must suffer by the act of a third, he who has enabled such third party to occasion such loss must sustain it. 1st Parsons on Contracts, page 938 chapt. 3; *Hanks v. Drake*, 49 Barb. 186; *Rice v. Groffman*, 56 Mo. 434.

4. The statement or memorandum at the top of the note in reference to the authority of agents is no part of the note—*is not a condition on the margin of said notes.* It is not signed by A. Sumner nor does it purport to be a restriction on any of A. Sumner's agents.

NORTON, J.—This was a suit instituted before a justice of the peace in Cass county, on two promissory notes, one for the sum of $20.00, and the other for $25.00. There was a trial before the justice and judgment for the defendant, from which plaintiff appealed to the Circuit Court, where, upon a trial *de novo*, judgment was again rendered for defendant, from which plaintiff, after an ineffectual motion for a new trial, has appealed to this court. On the trial it was agreed by the parties that the evidence would show that the notes sued on were executed in part payment for a Wheeler & Wilson sewing machine, sold by J. W. Moore as the agent of A. Sumner, the payee in said note; that said Sumner at the date of said notes was the general agent of plaintiff, and since the maturity of the same, transferred them to plaintiff; that the whole amount of the other notes given for said machine has been paid in cash by defendant, and a portion thereof was paid to Moore; that at the time of the sale of said machine, it was agreed between defendant and said Moore, that said defendant should board said Moore and his wife, who was helping him, and his team, which was being used in the selling of machines, at a stipulated price for board then agreed upon, and that the amount of such board should be received in payment on said machine, and credited on the notes given for the same; that such agreement was one of the inducements to defendant to purchase the machine; that said Moore agreed to have the

amount of such board credited on the notes, and to receive it in payment thereof, and that this agreement was made at the time of the sale, and immediately before the execution of the notes; that the amount paid by defendant in such board, on said notes, equals or exceeds the balance of the notes sued on; that said Moore, as agent for said Sumner, sold Wheeler & Wilson sewing machines for cash, and received the money therefor, and as such agent, collected notes given for said machines to said Sumner; that the commission of said Moore as agent, was twenty-one dollars on each machine, and he was to pay his own expenses; that during the time he boarded with defendant, he sold fifteen or twenty of them; that plaintiff nor said Sumner ever ratified said agreement, and that no credit was ever entered on said notes for board, and that the same have been in the possession of plaintiff and said Sumner, and that they knew nothing of said alleged agreement.

I. Upon the above facts the case was submitted to the court without the intervention of a jury. The refusal of the court to give the following instruction on behalf of the plaintiffs, is the error complained of: "If the court believes from the evidence that the defendant executed the notes read and sued on in this case, then the court should find for the plaintiff the amount which appears to be due thereon, notwithstanding the court may also believe that the defendant may have made with the agent who sold the machine for which said notes were given, the cotemporaneous parol agreement mentioned in the statement of the evidence, and may have furnished board to said agent, pursuant to said agreement of value equivalent to the sum so due on said notes." The facts in the case show that Moore, the agent who sold the machine in question had authority to sell, and that he was to receive, as compensation for his services, twenty-one dollars for each machine sold. Under this authority he had a right only to sell, and in exercising this right in the absence of particular instructions, might sell according to

1. AGENT TO SELL: implied powers.

the usual mode of dealing in that particular trade, and might sell on credit if such sales were customary in that business and locality. He had no right to barter, exchange, or pledge the property thus entrusted to him for sale, for his individual debt, antecedently contracted, or to be subsequently contracted. This is especially true in this case as the defendant was notified by a statement in the margin of the notes, "on which this suit is brought," that "no agent is authorized to make any contract or verbal promise differing from that written and printed on the face of this note," and the further condition, "that it is agreed between the maker of this note and A. Sumner that the Wheeler & Wilson Sewing Machine No. R. 488, for the use of which, to the maturity thereof, this note is given, is and shall remain the property of A. Sumner, and that in default of payment thereof said machine shall be returned to said Sumner, his agent or attorney." In the case of *Berry et al. v. Rhodes*, 18 Mo. 147, it was held that when A consigned goods to B for sale on commission, a sale of them by B to C in payment of an antecedent debt of B to C did not divest A of his title in the goods. The court, in its opinion, quotes approvingly the case of *Holton v. Smith*, 7th N. H. 446, in which it was held that an agent having the goods of his principal to sell, cannot sell them to his own creditor in payment of his debt so as to pass title.

2. CASE ADJUDGED.

II. Although an agent (known to be such) is ordinarily entitled to receive payment of any debt due to his principal in the course of his agency, yet he does not thereby acquire any right to receive payment except in the ordinary modes of business. He has no right to change the security of his principal for his debt, or to make himself the debtor of the principal for the like amount in lieu of the person who owes the debt, without the consent of the principal to that effect. If an agent has authority to receive for his principal a debt due from a third person to him, and the agent owes a like amount, or a greater, he has no right to substitute himself

as the debtor of the principal, giving him credit for the amount, or to set off the debt due by him to such third person. Story on agency, sec. 413, 429, 430; *Buckwalter v. Craig*, 55 Mo. 71; *Greenwood v. Burnes*, 50 Mo. 52; Wharton on agents, 210; *Flanagan v. Alexander*, 50 Mo. 51. The defendant dealing, as he was, with an agent of limited power, knowledge of which was imparted to him by the recitals on the margin of the note, could not bind the principal by making a contract beyond the authority of the agent. 1 Parsons on contract, 41; *Tate v. Evans*, 7 Mo. 419; *Goodman v. Simonds*, 19 Mo. 106. We therefore, in the light of the facts of this case and authorities, think the court erred in refusing the instruction asked for by plaintiff, and for this reason the judgment will be reversed and the cause remanded. The other Judges concurring, except Judge SHERWOOD, absent.

REVERSED.

MASTERSON v. MARSHALL, APPELLANT.

1. **Swamp Lands:** TITLE TO PASSES WITHOUT PATENT, WHEN. Under the act of Congress of September 28th, 1850, (U. S. R. S. §§ 2479-81) when any tract of land has been selected as swamp land, the selection approved by the Secretary of the Interior, and the land accepted by the Governor, the title becomes thereby vested in the State, without any patent from the general government.

2. ———: RELINQUISHMENT OF THE STATE'S TITLE TO: INDEMNITY PROVIDED BY ACT OF CONGRESS OF MARCH 2D, 1855. The Missouri swamp land act of 1868, (Sess. Acts 1868 p. 72 §§ 24 and 25) does not constitute a relinquishment by the State of its title to such swamp lands as may have been sold by the general government since the passage of the said act of Congress; but only an authority to the Governor to relinquish at the request of the county court of any county in which such lands may be; nor does it amount to an unconditional acceptance of the indemnity offered to the State for such relinquishment by the act of Congress of March 2d, 1855, but merely authorizes the Register of Lands to collect such indemnity from the United States in cases where relinquishment has been duly made by the Governor, or swamp lands belonging to the State have been sold by the general government.

Appeal from Carroll Circuit Court.—Hon. E. J. Broaddus, Judge.

Hale & Eads for appellant.

1. The title to the land in controversy vested in the State in fee at least as early as January 24, 1854. *Hann. & St. Joe. R. R. Co. v. Smith*, 41 Mo. 310; S. C. 9 Wall. 95; *Clarkson v. Buchanan*, 53 Mo. 563; *Campbell v. Wortman*, 58 Mo. 258.

2. Plaintiff relies on the Act of Congress of March 2, 1855, entitled "an act for the relief of purchasers and locators of swamp and overflowed lands," and on the Act of March 3, 1857, entitled, "an act to confirm to the several states the swamp and overflowed lands selected under the act of September 28, 1850, and the act of March 2, 1849." These acts were not intended to apply to and do not affect lands which have been ascertained, approved, and set apart as swamp lands, belonging to the states, and which had been according to law certified to the Governor as such, and patents ordered to issue. Congress would, clearly, have no power to pass such a law; but we hold that this was not the intention of either act. It is a matter of history that there were large quantities of lands selected as swamp lands and reported to the departments at Washington, which were suspended, and up to the date of these acts had not been approved by the Secretary of the Interior. Many of them had been pre-empted and the pre-emptors had been allowed to enter them on claim and proof that they were not swamp lands, and great numbers of these cases were pending before the department at Washington. There were also many thousand acres reported to the department as swamp, which had never been approved or acted on, and the character of the lands remained unsettled and unascertained. We insist that these acts were intended and could only apply to these cases; that is, that lands which had been located and pre-empted

or entered by individuals, and which were *claimed* as swamp lands, should be patented to such individuals, with some provisoes applicable to cases where the counties and states had already sold and conveyed prior to the entry. This is explained by the fact that in many cases the county and State had sold lands, that had been selected by the agents of the State or county, before the lists had been approved by the proper departments at Washington or certified to the Governor of the State. And if on investigation by the proper authorities they should turn out not to be swamp land, the Secretary of the Interior still had power to reject or disapprove such selection. To such lands these acts might well apply; and this is the only construction that can be given to them consistenly with the rights of the States under the original grants. It is further provided by the same acts that all other lands selected and claimed as swamp land by the several states should be confirmed to the states, and patents required to be issued therefor. These acts construed in this way may be regarded as a settlement of the conflicting claims which had arisen between the Federal Goverment and those claiming under it by entry of such lands and the State authorities. It is the general intention and scope of these acts to settle the controversy in regard to lands *claimed* as swamp land. It was a fair settlement, when accepted and acted upon by the states. A large quantity of lands were thereby confirmed to the states, which were in an unsettled condition, claimed by the states and counties, and the title of purchasers from the general government who had entered portions of them was confirmed and settled. There was no necessity for any act of Congress confirming the title of the states to lands that had been selected and approved, and patents ordered to issue. The original grant required these patents to issue. The act of March 3, 1857, purports to be an act to confirm to the several states the swamp and overflowed lands which had been selected.

No doubt if the State had reconveyed her title to the

general government on the request of the Commissioner of the General Land Office with the consent of the counties, and before they had been sold to individuals, these acts would have operated to confirm the title of the purchasers from the general government.

The plaintiff's patent is a nullity. *Carman v. Johnson*, 20 Mo. 108; *Allison v. Hunter*, 9 Mo. 741; *Archer v. Bacon*, 12 Mo. 149; *Jackson v. Lawton*, 10 John. 22; *Jackson v. Hart*, 12 John. 76.

Ray and Ray for respondents.

1. In actions of ejectment the junior patent will prevail over the elder whenever the latter for any reason is void; or whenever it was forbidden by any law, or was issued contrary to or in violation of law; or whenever the land was withdrawn from sale, or otherwise appropriated by Congressional grant or confirmation. *Stoddard v. Chamtren*, 2 Howard 284; *Bagnell v. Broderick*, 13 Peters 436; *Sarpy v. Papin*, 7 Mo. 503; *Wright v. Rutgen*, 14 Mo. 585.

2. Plaintiff's title is expressly protected and confirmed by the acts of Congress of March 2, 1855, and March 3, 1857. See 10 U. S. Stat. at large 634; 11 Ib. 251; *R. R. Co. v. Fremont County*, 9 Wall. 89; *Thompson v. Prince*, 67 Ills. 283; *R. R. Co. v. Smith*, 9 Wall. 95.

3. The State of Missouri is estopped from calling in question the validity or constitutionality of said acts of Congress by its virtual ratification and confirmation, and by its acceptance of the indemnity provided for said State by said acts of Congress for the loss of said lands. See Sess. Acts Mo. 1868 p. 72 § 25. It cannot be allowed to ratify in part, or accept the indemnity, for one particular tract and refuse it as to another. *Jarrett v. Morton*, 44 Mo. 275. The validity of these acts, if ratified at all, are ratified as to all the swamp lands thus entered by said purchasers. Even if said acts were invalid, by reason of the title

having passed from the government by the original swamp land grant, yet if the State of Missouri by legislative enactment validated said acts and accepted the indemnity offered by Congress, then the State *thereafter* was estopped from calling in question the validity of such acts, or of issuing patents therefor, and in either event, its patents so issued would be void and pass no title. The patent issued by the State on the 12th of February, 1869, subsequent to such ratification, is illegal, null and void.

4. The donation of these lands by the State to the counties did not make them the absolute property of the counties. The counties only held them in trust for benefit of school fund, and for the purposes of these lands the counties are merely political subdivisions of the State, and held them as such, and the State by its said donations had not parted with its control of same. *State ex rel Robins v. New Madrid County*, 51 Mo. 82.

Hough, J.—This was was an action of ejectment for certain lands in Carroll county. The plaintiff claimed title by virtue of a location and settlement made thereon in August, 1856, under the pre-emption laws of the United States, followed by an entry at the United States Land Office in June, 1857, and a patent from the United States based thereon, dated August 5, 1873. The defendant claimed title under a purchase from the county of Carroll in July, 1868, and a deed from the State made in pursuance thereof, dated February 12, 1869. It appears from the record that the lands in question were selected as swamp lands under the act of Congress of September 28, 1850, and that in December, 1853, said selection was approved by the Secretary of the Interior, and in January, 1854, a list of said lands was certified by the Commissioner of the General Land Office to the Governor of Missouri, who, in pursuance of the provisions of the act of Congress aforesaid, requested that a patent might issue for the same, and on the 9th day of March, 1858, a

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patent was issued by the United States to the State of Missouri therefor. By the act of Assembly of March 3, 1851, the lands granted to the State by the act of Congress before mentioned, were donated to the counties in which they were situate. The Circuit Court decided that the plaintiff had the better title, and judgment was entered accordingly; to reverse which the defendant has appealed to this court.

I. SWAMP LANDS: title to passes without patent, when.

I. The first section of the act of September 28, 1850, granted the whole of the swamp and overflowed lands remaining unsold at the passage of the act to the states in which the same are situate. By the second section it was provided that lists and plats of such lands should be made by the Secretary of the Interior and transmitted to the Governor, and, upon his request, patents should issue to the State therefor. On the 2d of March, 1855, Congress passed an act for the relief of purchasers and locators of swamp and overflowed lands, which directed the President of the United States to cause patents to be issued to all purchasers or locators who may have made entries of the public lands claimed as swamp lands prior to the issue of patent to the State as provided in the second section of the act of September 28, 1850. This act further provided for payment to the State of the purchase money received by the United States therefor, upon due proof before the Commissioner of the General Land Office, that any of the lands purchased were swamp lands within the true intent and meaning of the act of 1850. On the 3d of March, 1857, Congress passed another act, continuing in force the foregoing act and extending its provisions to all entries and locations of lands claimed as swamp lands made since its passage, and as selections of swamp and overflowed lands had in many instances been made by the states before the required lists and plats were made by the Secretary of the Interior, the act also declared that all such selections theretofore made and reported to the Commissioner of the

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General Land Office, so far as the lands selected remained vacant and unappropriated, and not interfered with by actual settlement under some law of the United States, were by said act confirmed. We are not aware of any decision of the Supreme Court of the United States which determines the precise scope and effect of the foregoing acts, and it is unnecessary for us in the present case to undertake to define the limits of their operation. It is conceded by the plaintiff's counsel to be the settled doctrine of the court,—and they do not controvert its correctness or seek to have it reviewed,—that under the swamp land grant of 1850 a patent is not necessary in order to confer title upon the State, that where in any given case the particular tracts constituting a portion of the subject matter of the grant contemplated by the act of 1850 have been authoritatively ascertained, the grant at once takes effect as to the portion so designated, and the title thereto vests in the State without a patent, the issuing of which, as was remarked by Judge Holmes in the case of *Han. & St. Joe R. R. Co. v. Smith*, 41 Mo. 310, "may be considered as the act of a ministerial officer." Lists of such lands selected by State authority when approved by the Secretary of the Interior, and reported to and accepted by the Governor, are clearly sufficient to complete the grant and vest the title. Such lists were made in the present case, and the title to the lands in controversy was therefore vested in the State at the time of the location and settlement made by the plaintiff in 1856, although no patent had then issued to the State, and said lands were no longer subject to sale by the United States authorities; and it was beyond the power of Congress to divest such title by legislative enactment without the consent of the State. The record shows that a relinquishment of the State's title to these lands was twice requested of the Executive of this State by the Secretary of the Interior, but no such relinquishment was ever made.

II. Plaintiff's counsel, however, contend that, if the

acts of 1855 and 1857 were of themselves insufficient to divest the title of the State to the lands in question, sections 24 and 25 of the act of Assembly of 1868, in relation to swamp lands, constitute a legislative acceptance of the provisions of said act, and the indemnity thereby provided, and create an estoppel to any claim on the part of the State to the proprietorship of these lands. Section 24 of the act named, authorizes the Governor to relinquish the title of the State to such swamp and overflowed lands as may have been sold by the General Government since the passage of the act donating said lands to the State, whenever the counties interested in said lands may, by an order of the county court, authorize him so to do. Section 25 constitutes the Register of Lands the agent of the State to settle and adjust all claims the State of Missouri may have against the United States, growing out of the swamp land grant, and also to receive all money, or scrip, from the General Government, due the various counties as indemnity on account of swamp lands sold by the government of the United States since the donation of said lands to the State. We confess ourselves wholly unable to perceive how the foregoing provisions can be fairly construed as constituting a positive relinquishment by the State of its title to the lands in question, or an unconditional acceptance of the indemnity provided by the acts of Congress. On the contrary, the only relinquishment provided for, is one to be made by the Governor at the request of the county courts, and the indemnity which the Register of Lands is authorized to collect from the United States, is such only as would accrue in consequence of relinquishments so made, or such as would accrue in cases where no relinquishment was necessary, that is, in cases where the title had not vested in the State at the date of the acts of Congress aforesaid. It is no answer to this view to say that it was unnecessary, as a matter of law, to have the consent of the counties in order to make a valid relinquish-

2. ——: relinquishment of the State's title to: indemnity provided by act of Congress of March 2d, 1855.

ment to the United States; that although the lands had been donated to the counties, they were still subject to the control and disposal of the law-making power. This may be so, but as the law-making power has limited the power of relinquishment to the cases named, such limitations being reasonable and valid, must be observed. We are of opinion, therefore, that the patent under which the plaintiff claimed title, was issued without authority of law, and was void, and the judgment will therefore be reversed and the cause remanded. The other Judges concur, except Judges NORTON and HENRY, who were not members of the court when this case was argued.

REVERSED.

SCWARD ET AL. v. JOHNSTON, PLAINTIFF IN ERROR.

Estoppel: REAL ESTATE: TITLE TO: ATTORNEY AT LAW. Plaintiffs having bought a lot, relying upon the opinion of defendant, an attorney at law, that the title was good, subsequently sold the lot to defendant on credit, giving him a bond for title, and at his request erected a building on it, of which he took and kept possession. In a suit to recover the price of the lot and house, *Held* that defendant was estopped by these facts to show that plaintiffs had acquired no title to the lot.

Error to Pike Circuit Court—HON. A. H. BUCKNER, Judge.

John Johnston, p. p.—Equity will not require a purchaser, holding title bond for good and sufficient conveyance, to accept and pay for a defective or doubtful title. *Sackett v. Williamson*, 31 Mo. 54; *Wellmans Adm'r v. Dismukes*, 42 Mo. 101; *Dietrich v. Franz*, 47 Mo. 85. Plaintiffs seeking for specific performance must tender deed such as their title bond requires, before they are entitled to judgment or decree. 2 *Hilliard on Vendors*, 71, 72; *Burwell v. Jackson*, 9 N. Y. 546; 4 *Abbott's Nat. Dig.* 339. If it were proven that defendant, as attorney for plaintiffs, gave them an opinion, pronouncing the title good, which opinion

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afterwards proved to be erroneous, plaintiffs might, perhaps, have a right of action against defendant for damages, but as there is no pretence that defendant claimed any title in himself, or that he was the party making sale of the property to plaintiffs, they will hardly be permitted to show such mistaken opinion to relieve them in this action from compliance with the terms and requirements of their title bond. *Estoppel en pais* can only affect existing title. *Donaldson v. Hibner*, 55 Mo. 492.

Fagg & Dyer for defendants in error.

Defendant is estopped from denying the title which plaintiffs had at the time of his purchase, and which they acquired on the strength alone of his advice as their attorney.

Norton, J.—Plaintiffs instituted their suit in the Circuit Court of Pike county, upon three promissory notes executed by defendant in consideration of the sale of lot 86, in block 117, in the city of Louisiana, and of work and labor and materials furnished in building a house thereon, at the request of defendant, and for him. It is further alleged that plaintiffs executed and delivered to defendant a title bond to said Johnston, in which they obligated themselves, upon the payment of said notes, to convey to said defendant the lot in question by a good and sufficient deed of general warranty. It is also alleged that plaintiffs were willing and ready to comply with the terms of the title bond, and judgment was asked on said notes as well as a judgment for the sale of the lot. The answer of defendant admits the execution of the notes, the consideration for which they were given, and the execution of the title bond, but denies that plaintiffs ever had any legal or equitable title to said lot, and alleges that, in September, 1873, defendant tendered to plaintiffs the full amount of said notes, interest and costs, and demanded a deed, which was refused. The new matter set up in the answer was denied

by replication, and upon a trial of the cause by the court, without the intervention of the jury, judgment was rendered for plaintiffs for $1,226.64 and for the sale of the lot in conformity with the prayer of the petition. It appears from the evidence in this case that the plaintiffs claimed title to the lot in question under a deed, executed to them by David P. Dyer and George Hind, trustees of Calvary Church of Louisiana, the consideration of which was five hundred dollars. One of the plaintiffs testified that before the acceptance of the deed by them, they employed defendant, as a lawyer, to examine the title to said real estate, who told them that the title was good, and that he would buy the property—that he was not afraid of the title; that plaintiffs would not take the deed from Dyer and Hind until after Johnston had pronounced the title good; that five or six months after this plaintiffs sold the property to Johnston. Defendant, in his testimony, admits that plaintiffs employed him to examine the title to the lot in question, about the time they made the purchase from Dyer and Hind; that he was employed by them to write the deed from Dyer and Hind to plaintiffs, and to examine the title only so far as to enable him to write the deed, and not to make any general examination of the merits of the title; that he had made no such examination till after this suit was brought. He admits that he advised plaintiffs that the title was good: does not deny that he told them he (Johnston) would buy the property. Defendant admits, in his evidence, that he was in possession of the lot, and admits, in his answer, that plaintiffs, at his request, furnished the materials and built a house on said lot, which constituted part of the consideration of the notes. We know of no principle of either law, equity or sound morals that would allow the defendant to retain possession of what he bought and escape the payment of what he agreed to pay, upon the ground that plaintiffs' title was defective, especially when the evidence shows that, as a lawyer, employed for the purpose of investigating the title, he

informed the plaintiffs that it was good, that he was not afraid of it and would buy the property, and that plaintiffs, acting upon these representations, on which they had a right to rely, bought the property and sold it to defendant. If it were even so that a flaw or defect in plaintiffs' title existed, which would occasion a loss, either to plaintiffs or defendant, the equity of the case, as well as the justice of it, would require that it should fall on the defendant, by whose conduct it was occasioned. Under the view taken of this case, it is wholly unnecessary to consider the technical objections made to the action of the trial court in admitting evidence, or to subject them to the criticism which an investigation of them would render necessary. We think that the judgment below was for the right party, and it will therefore be affirmed, in which the other Judges concur.

AFFIRMED.

INTERNATIONAL BANK OF ST. LOUIS v. FRANKLIN COUNTY, APPELLANT.

1. **County warrant drawn on general fund, may be sued on when.** A county warrant payable out of any money in the treasury appropriated for county expenditures is a written acknowledgement of indebtedness by the county, and if not paid, when presented, may be sued on by the legal holder, although there is no money in the treasury to pay (*overruling Howell v. Reynolds County*, 51 Mo. 154).

2. **County warrant, assignment of.** No assignment of a county warrant will transfer the title unless made in the form prescribed by the statute (W. S. 415 sec. 34).

3. **Defective pleading not cured by verdict, when:** STATUTE OF JEOFAILS: BILL OF EXCEPTIONS. Defective averment in the petition of matter essential to be proved in order to authorize a verdict for plaintiff will not be cured by verdict, either at common law or under the statute of jeofails (Wag. Stat. 1036 §§ 19, 20), when it appears by a bill of exceptions that the evidence offered at the trial did not tend to supply the defect.

4. **Case adjudged.** Where the petition in a suit upon a county warrant stated the drawing of the warrant in favor of a person other than plaintiff, its delivery, that subsequently for a valuable consideration plaintiff became the holder and owner, and presented it to the county treasurer for payment, which was refused, but interest was paid thereon, and that the warrant was due plaintiff and unpaid, but failed to aver assignment to plaintiff in the form prescribed by statute, such assignment will not be presumed in support of a verdict and judgment for plaintiff, if the bill of exceptions shows that none such was made.

Appeal from Franklin Circuit Court. — Hon. D. Q. Gale, Judge.

John W. Booth for appellant.

These special statutory instruments are in no sense direct unqualified promises to pay. That the manner in which they are to be drawn (see W. S. of 1872, p. 415 § 31), the fund out of which, and the order in which they are to be paid, are all expressly and specially regulated by statute, see W. S. 1872, page 410 § 8, page 411 §§ 9 and 10. They are payable when the ordinary revenue of the county brings into the county treasury funds sufficient, first for the payment of all like warrants first presented for payment, and then for its payment; and not before that time. Plaintiffs' statement omitting as to each cause of action to state that money appropriated for county expenditures, sufficient for the payment of the whole or of some part of any of plaintiffs' warrants, after setting apart funds sufficient for payment of all like warrants presented to the treasurer of defendant for payment prior to the presentation of respondent's warrant, failed to state facts sufficient to constitute a cause of action against appellant. *Howell v. Reynolds County*, 51 Mo. 154. The purposes for which counties are organized and to which they are confined render it an impossibility that a county should have property subject to the ordinary process of execution and sale for the satisfaction of a judgment.

And with the exception of the cases in which county courts have power to levy special taxes for the payment of certain classes of indebtedness, which power they may perhaps be compelled by mandamus to execute, persons who deal with counties so as to become general creditors must be content to take their pay from the county treasury out of the ordinary revenue of the county, in the manner and according to the order fixed by the statutes authorizing the creation and regulating the payment of county debts.

J. C. Kiskaddon for respondent.

1. An action can be maintained on a county warrant. Wag. Stat. 408 § 4; *Jeffries v. Pacific*, 61 Mo. 155; *Young v. Camden Co.*, 19 Mo. 309; *State v. Clay Co.*, 46 Mo. 231; *State v. Justices Bollinger Co. Ct.*, 48 Mo. 475; *Steel v. Davis Co.*, 2 Greene (Iowa) 469; *Clark v. Polk Co.*, 19 Iowa 248; *Savage v. Crawford Co.*, 10 Wis. 49; *Markwell v. Waushara Co.*, Ib. 73.

2. It can not be maintained that because the warrants were to be paid "out of any money in the treasury appropriated for county expenditures," therefore it is necessary to allege in the petition that there was money in the treasury appropriated to county expenditures out of which the warrant could or might be paid. Such an appropriation does not create a fund, nor does the failure to appropriate or appropriate enough discharge the county from its indebtedness. *Clark v. Des Moines*, 19 Iowa 199; *Kelly v. Mayor &c.*, 4 Hill 263; *Pease v. Cornish*, 19 Me. 191; *Ubsdell v. Cunningham*, 22 Mo. 124; *Terry v. Milwaukee*, 15 Wis. 490; *State v. Clay Co.*, 46 Mo. 231; *State v. Justices Bollinger Co. Ct.*, 48 Mo. 475; *Campbell v. Polk Co.*, 49 Mo. 214; *Jeffries v. Pacific*, 61 Mo. 155.

Two principles appear to be clearly established by all the cases. These are: 1st. If the payment is to be made on account of a general municipal indebtedness, then the

direction in the warrant or order as to what it shall be paid out of, is considered merely as information conveyed to the treasurer on what account of the general fund the payment is made, and the municipality is liable to action on the warrant; and 2d. If the warrant or order shows on its face that it is issued on account of a general municipal indebtedness shared alike by the whole municipality, then the municipality is liable in an action on the warrant, although it may contain a command that it shall be paid out of some particular part of the general fund. The warrants sued on in this case are plainly within both these conclusions.

3. Under our statute it is not necessary for us to allege in our petition that all warrants presented to the treasurer prior to the presentment of the warrant sued on had either been paid or money set apart to pay them, or that all warrants had been provided for. If all warrants presented prior to the presentment of these warrants had been paid, and there was money in the treasury set apart, or which might be set apart, to pay them, then the only thing necessary for the holder to do would be to present them and draw his money, and an action to recover it of the county would be ridiculous. If the treasurer refused to pay such warrants, an action would not lie against the county, but mandamus on the treasurer would be the proper remedy. *State v. Treasurer Callaway County*, 43 Mo. 228.

Under the statute (Wag. Stat. 415 § 31) the county court cannot make an allowance and order a warrant issued until the debt is due. Yet by the defendant's argument the creditor in attempting to collect a debt then due him is by that very attempt granting to the debtor credit for an uncertain and indefinite period, *i. e.* until all warrants presented prior to his are paid. The length of that period depends entirely on the amount of the revenue; and that depends to a great extent on the will and caprice of county officials, who may make a levy grossly inade-

quate and continue to do so from year to year. For this the creditor has no remedy; none by mandamus, for it is a general county indebtedness, which must first be reduced to judgment; none by ordinary civil action, for he has accepted a warrant, and must wait until all warrants presented prior to his are paid. The anomaly is presented of a claim due and not due in the same breath. It is due at the moment of its allowance; three judges gravely consider it and decide that it is due, when, presto! the decision rendered, it becomes due in the dim, misty and uncertain future. This is not the law. *Savage v. Crawford Co.*, 10 Wis. 49; *Pelton v. Crawford Co.*, Ib. 69; *Markwell v. Waushara Co.*, Ib. 73; *Montague v. Harton*, 12 Wis. 599; *Terry v. Milwaukee*, 15 Wis. 490

SHERWOOD, C. J.—Action on ten county warrants made payable "out of any money in the treasury appropriated for county expenditures." The single issue tendered by the answer was contained in the denial that the warrants "were due and payable." Judgment went for plaintiff. The motion in arrest having questioned the sufficiency of the petition necessitates an examination of its allegations; not to determine whether a demurrer would have been well taken, for we have no doubt on this score, but in order to determine whether the allegations are of such a nature as will, with the intendments which the law will supply, be sufficient after verdict. The petition in brief states the drawing of the warrants in favor of and their delivery to Bauer, that subsequently for a valuable consideration plaintiff became the holder and owner of the warrants, presented the same to the treasurer for payment, which was refused because of no money in the treasury, and that fact duly endorsed on the warrants; that the same were duly registered by the treasurer, who on the order of the county court, in the year 1871 paid plaintiff two years' interest on the warrants; that the warrants

were due plaintiff and unpaid, and therefore judgment was asked.

The rule in these cases, at common law, is said to be this: "Where a matter is so essentially necessary to be proved that had it not been given in evidence the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contained terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict." *Jackson v. Pesked*, 1 Maule & Selw, 234. And doubtless the like rule should prevail even under our code practice, were an appropriate case presented for its application, but certainly not where the evidence is preserved in the bill of exceptions, and that bill shows no evidence tending to supply the defective averment. In such case there is no room for presumptions in favor of the verdict, and both the rule and the reason whereon it is founded must alike cease together. This view obtained in *Frost v. Pryor*, 7 Mo. 314, and is undoubtedly the correct one. There one of the deeds in the plaintiff's chain of title, owing to a defective acknowledgement, conveyed no title, and it was held that the record showing the contrary, no notice of the title having been perfected could be under these circumstances presumed, and that the case was unlike "those in which an appellate court is required to arrest the judgment from an examination of the declaration alone, unaccompanied by a bill of exceptions preserving the evidence."

1. COUNTY WARRANTS drawn on general fund, may be sued on when.

In the case at bar the evidence is all preserved, and the only endorsements which the warrants declared on bear do not show any assignment to the plaintiff. The statute (§ 34 p. 415 1 W. S.) provides: that "every assignment of any such warrants shall be in the following form:

2. COUNTY WARRANT, assignment of.

For value received I assign the within warrant to A. B. this —— day of ———, 18—. Signed. C. D.

No blank indorsement shall transfer any right to a warrant, nor shall it authorize any holder to fill up the same." And the next succeeding section (35) prohibits the treasurer from paying "any warrant to any other than the person in whose favor the same is drawn, or his executor or administrator, or the person to whom the same has been assigned *in the manner above directed*," under a penalty of being deemed guilty of a misdemeanor and fined therefor from $10 to $500.

3. DEFECTIVE PLEADING NOT CURED BY VERDICT, WHEN: statute of jeofails: bill of exceptions.

It is obvious that the plaintiff has shown no title to the warrants declared on, and under the ruling in *Frost v. Pryor, supra*, we shall not in the face of the record to the contrary, assume that to have been proven which that record conclusively shows was not done, namely, that the plaintiff had title in the warrants. Nor do we regard the statute of jeofails (§§ 19 and 20) as giving any help to the plaintiff, for we certainly should not feel at liberty to supply the defective averments in the petition, when the record itself shows that the plaintiff has acquired no title in consequence of no assignment of the warrants in conformity with the prescribed statutory method having been made. The conclusion reached on these points must accomplish a reversal of the judgment, but inasmuch as a new trial may probably occur, it is thought best to discuss other matters.

It will be observed respecting warrants of the sort under consideration that the statute (1 W. S. § 32 p. 415) provides that "every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same." So that according to express statutory provision each warrant is an ascertainment that the sum therein mentioned is "*due*" to the person in whose favor the warrant is drawn. And it will be further observed that the preceding section (31) makes it the duty of the court, before ordering their clerk to issue a warrant, to ascertain the "sum of money to be due from the county."

In consequence of these provisions of the statute it follows that each warrant, whether drawn on a *general* or special fund, for the statute makes no distinction, is both a judicial ascertainment and a written acknowledgement of indebtedness by the county. In short, it is to all intents and purposes the *promissory note* of the county. Abundant authorities, if indeed authorities are needed where the expression of the legislative will is so plain, sustain this position. In *Perry v. City of Milwaukee* (15 Wis. 490), where the action was brought on certain orders made payable out of any money belonging to the school fund, drawn on the city treasurer by the board of school commissioners, the law authorizing such orders to be thus drawn, and payment having been by the treasurer refused, it was said:

"The holder of these orders, it is claimed, stands in precisely the same relation to the city, that a holder of a check upon a bank, drawn by a party having no funds in the bank, does in respect to the bank upon which it is drawn. It appears to us that this is an erroneous view of the subject. * * * The orders drawn by the officers of the school board are as much evidence of the indebtedness against the city as an order drawn by the mayor and clerk would be. * * * It is quite true that the law provides that the school fund shall be exclusively applied to the payment of the teachers' salaries and the other necessary expenses of the public schools; but suppose the fund is inadequate and insufficient to meet these expenses and discharge the orders of the school board, is there no remedy against the city? We have no doubt about the liability of the city on these school orders. And it is the duty of the city authorities to raise money to pay them, as much as to discharge any other just indebtedness against it. * * * If the city authorities neglect to exercise this power, or fail to levy and collect a revenue sufficient to meet its indebtedness, this is no reason why it should be relieved from all liability to those who have

just claims against it for teaching its public schools. It seems to us there can be no doubt about the correctness of these principles of law."

In *The Board of Commissioners of Floyd Co. v. Day* (19 Ind. 450) it was held that: "The auditor of the county is authorized by law to audit claims against the county, and to draw his warrant or order upon the treasurer for their payment. Such order when drawn is in legal effect the promissory note of the county." In *Clark v. Des Moines* (19 Iowa 199) Judge Dillon, speaking for the court, said: "It is claimed by the city that the warrants issued for road purposes are payable out of a 'particular fund,' and that the obligation to pay depends upon the existence and the sufficiency of the special fund. * * * There is nothing in the charter which favors the notion that the liability of the city for road debts is conditioned upon the existence of road funds in the treasury. For road debts the city is absolutely and unconditionally liable as for other debts. This liability cannot be controlled or varied by the form in which warrants may be drawn or worded by the municipal officers." In *Campbell v. The County of Polk* (3 Iowa 467) suit was brought on the county warrants, drawn payable out of any money not otherwise appropriated, and it was claimed on behalf of the county that the creditor in order to recovery should allege and show that there was money in the treasury; but the court said: "It is as clear to us as any proposition can be that he should not be held to this. He is obliged to have his claim settled by the county judge; the judge cannot pay the money, but is obliged to draw a warrant on the treasurer for it. Now, is there any reason or justice in saying that the creditor must allege and prove funds to be in the treasury, because he took a warrant, or because he took *such* an one? Upon a refusal to pay, he might return the warrant and sue on the original consideration, and then he would be relieved from that responsibility. In the opinion of this court these warrants were payable

ally, and if there was no money in the treasury, the county is answerable. All considerations of justice and of good law require this decision." To the same effect are *Lyell v. Supervisors, etc.*, 6 McL. 446; *Savage v. Supervisors, etc.*, 10 Wis. 49; *Paddock v. Symonds*, 11 Barb. 117. The soundness of the above doctrine cannot, we think, be successfully questioned. Nor can any good reason be shown why a county having, as in the present instance, given her written acknowledgements of indebtedness, should not occupy precisely the same footing as an individual would under like circumstances. If this be not so, of what avail is it to obtain a warrant at all? None whatever. In *Mansfield v. Fuller* (50 Mo. 338), where the pay claimed for certain services would come "from the general revenue of the county," it was held that *mandamus* would not lie until the claim was first reduced to judgment; and in *State ex rel. White v. Clay County* (46 Mo. 231), where the warrants were drawn payable "out of any money in the treasury appropriated for county expenses," it was held that the warrants being given for the ordinary indebtedness of the county, *mandamus* could not lie till judgment on such warrants was first obtained; and in *Howell v. Reynolds Co.* (51 Mo. 15), where the warrants sued were of similar form to those in the case at bar, it was held in substance that the plaintiff could not recover without alleging and proving "that there were funds in the treasury out of which the warrants might have been paid, and that the treasurer refused to pay them out of such funds." So that in respect to warrants of this sort, the decidedly unique position is taken by this court, that you cannot have *mandamus* until you have *judgment*, and that you cannot have the latter, unless there are funds in the treasury. In other words, that a warrant holder has no means of compelling the payment of his warrants, except in those cases where the *treasury* is *full* [illegible] bulsory process *altogether unnecessary*. The ruling [illegible] e last mentioned case we regard as erroneous,

and disapprove of the same, holding, as we do, that the warrants were due and payable, regardless of the fact whether there was money in the treasury for that purpose or not, and that had plaintiff in its petition, and on trial, showed title in the warrants, we should not reverse the judgment, but because this was not done the judgment is reversed and the cause remanded. All concur.

REVERSED.

THE STATE v. WATSON, PLAINTIFF IN ERROR.

1. **Indictment:** STATUTORY LANGUAGE. An indictment need not describe the offense in the language of the statute, but may use words which, in their common acceptation, mean the same thing when spoken of the acts charged against the accused.
2. ——: PASSING FORGED DRAFT. An indictment which charges the defendant with falsely, &c., selling, exchanging and delivering as true a forged draft, knowing the same to be forged, and with intent to defraud, is good under a statute which prohibits the passing, uttering and publishing of forged paper.

Appeal from Iron Circuit Court.

Nathan C. Kouns for plaintiff in error.

I. The necessary elements of the crime denounced by section 9, page 468 Wag. Stat., are: 1st. That defendant shall "sell, exchange or deliver;" or, 2d. "Receive upon a sale, exchange or deliver"; 3rd. "For any consideration;" 4th. "Any forged paper described in section 8;" 5th. "Knowing the same to be forged;" 6th. "With intent to have the same uttered or passed." The distinctive element of the crime, that without which this particular offense cannot be committed at all, is that the forged paper must be knowingly sold, exchanged or delivered, or received

upon a sale, exchange or delivery for a consideration "with intent to have the same uttered or passed."

II. The essential elements of the crime prohibited by section 21, page 471 Wag. Stat. are that the defendant shall, 1st. "With intent to defraud;" 2d. "Pass, utter or publish as true;" or, 3rd. "Offer or attempt to pass, utter or publish as true;" 4th. "Any falsely uttered writings or imitations of coin."

III. The indictment, stripped of all verbiage, charges that the defendant did, 1st. "Sell, exchange and deliver;" 2d. "For a consideration of $550;" 3rd. "The forged check;" 4th. "With intent to defraud;" 5th. "Knowing it to be forged." But it fails to charge that these things were done "with intent to have the same uttered or passed," which is essential to a conviction under section 9; and it fails to charge that he did "pass, utter, or publish as true" the forged paper, which is essential to a conviction under section 21. The two crimes are of an essentially different nature, and this indictment which uses some of the words of both sections, omits the words which are peculiarly essential in both, and utterly fails to charge any offense known to the law under either. The indictment cannot support a conviction under either section. It cannot be pretended that the words "sell, exchange or deliver" are synonymous with the words "pass, utter or publish;" and, in fact, these words are everywhere used in the statutes as formulas, descriptive of essentially different crimes. They are used in many different sections, but never interchangeably. The crime defined by the words "sell, exchange or deliver" is one in which all parties to the transaction are equally guilty; that defined by the words "pass, utter and publish" is one of which one party only is guilty, while the other is defrauded.

J. L. Smith, Attorney General, for respondent.

I. The sale, exchange and delivery of a forged or

counterfeited bill of exchange, by a party knowing it to be forged, and for a consideration, is a passing and uttering, and is an unlawful act. *State v. Fitzsimmons*, 30 Mo. 238. If the act itself is unlawful, the law presumes an evil intent, and the allegation of such matter is, at most, but a matter of form. 5 Bac. Abr. 96; 6 East 464; Kelly's Crim. Law, § 197. The act of selling for value, with intent to defraud, carries the idea of an intent to have the same passed.

II. When the draft had been sold by the plaintiff in error to the Ironton Manufacturing Company, it had been by him passed. The "intent to have the same passed" had been carried out, and was embraced in the allegation, "did sell, exchange and deliver," &c., "with intent to defraud," &c. Nothing could be alleged that would indicate the intent to have the same passed as clearly as this.

III. If an indictment sets forth the facts constituting the crime with such certainty that the accused had notice of what he was called upon to meet and controvert, and the court, applying the law to the facts charged, could see that an offense had been committed, it is sufficient. The indictment at bar complies with the requirements of this rule.

HENRY, J.—In the Iron Circuit Court an indictment was preferred against defendant, of which the following is a copy: The Grand Jurors, &c., present that one D. A. Watson, late, &c., on the 16th day of February, A. D. 1876, at the county, &c., did falsely, fraudulently and feloniously sell, exchange and deliver, for the consideration of five hundred and fifty dollars, to the Ironton Manufacturing Company, as true, a certain falsely made and forged draft, purporting to be made and issued by the First National Bank of Macomb, in the State of Illinois, a bank duly incorporated under the laws of the United States, and purporting to be drawn on the American Exchange National Bank of New York, which said last mentioned falsely made and forged draft is as follows,

INDICTMENT: statutory language

(copying the draft), with the intent to defraud the said Ironton Manufacturing Company; and that the said D. A. Watson, at the said time he so sold, exchanged and delivered the said last mentioned falsely and forged draft as aforesaid, then and there, to-wit, on the said sixteenth day of February, A. D. 1876, well knowing the same to be falsely made and forged, contrary, etc." Defendant was tried and convicted, and sentenced to the penitentiary for eight years, and the cause is here on writ of error, and the only question is as to the sufficiency of the indictment. Section 21, page 471, Wagner's Statutes, provides that "every person who, with intent to defraud, shall pass, utter or publish, or offer, or attempt to pass, utter or publish as true, any forged, counterfeited, or falsely uttered instrument or writing, or any counterfeit, or any imitation of any gold or silver coin, the altering, forging or counterfeiting of which is hereinafter declared to be an offense, knowing such instrument, writing or coin to be altered, forged or counterfeited, shall, upon conviction, be adjudged guilty of forgery in the same degree as hereinafter declared for the forging, altering or counterfeiting the instrument, writing or coin so passed, uttered or published, or offered or attempted to be passed, uttered or published." By the 8th section, page 468, the counterfeiting, forging or uttering such an instrument as that described in the foregoing indictment, is made forgery in the second degree, the punishment for which, by section 29, page 472, is imprisonment in the penitentiary not less than five nor more than ten years. If the indictment is good under section 21 it is unnecessary to notice the other points made in the brief of defendant's counsel.

It will be observed that it contains every material allegation required by that section; but instead of the words "pass," "utter" and "publish" substitutes the words "sell," "exchange" and "deliver." Do these words, in connection with the acts charged, sufficiently describe the offense, or is the pleader

INDICTMENT: passing forged draft.

confined to the words in the section? It is generally, not, however, invariably, sufficient to describe the offense in the words of the statute; but it does not follow that other words may not be substituted. Selling, exchanging or delivering a bank bill or a piece of money is in common parlance passing the bill or money. The plain or ordinary and usual sense of the word "pass," as applied to coin or bank notes, is to deliver in exchange for something else, and is equally expressed by the words "sell," "exchange" or "deliver." The judgment will be affirmed. The other judges concur.

AFFIRMED.

On Motion for Rehearing.

Nathan C. Kouns for the motion.

I. The common, ordinary meaning of "pass" is to go by, to omit; of "utter," to speak, to pronounce; or "publish," to make public, to advertise; but the legal meaning of "utter" and "publish" is to declare or assert, by words or actions, that a forged paper is good, and it is passed when it is taken by the person to whom it is paid with this representation. Bishop's Statutory Crimes, 306.

II. It has been solemnly decided by courts of high authority that a defendant *cannot* be convicted on an indictment which charges that he "sold, exchanged and delivered" forged paper, by proof that he passed it, because the two offenses are essentially different and *vice versa*. *Van Valkenberg v. The State*, 11 Ohio 404; *Hutchins v. The State*, 13 Ohio 198. See, also, *U. S. v. Nelson*, 1 Abbott 135.

III. At common law the crime of forgery could only be committed by falsely making or altering a written instrument. Passing a forged paper, or selling it with intent to have it passed, was a common law cheat, and it is only forgery because the statute makes it so. This forgery is, therefore, strictly a statutory crime. It is settled law

that an indictment for a statutory crime must charge the essential elements necessary to constitute it: must charge all the circumstances which come into the definition of the crime as defined by the statute, and must charge not only the statutory definition of a crime, but those which constitute the particular crime indicted." *State v. Helm*, 6 Mo. 263; *State v. Ross*, 25 Mo. 426; *State v. Evers*, 49 Mo. 542; Bishop's Statutory Crimes § 37; Kelley's Criminal Law, "Indictments;" *State v. Reaky*, 62 Mo. 40; *State v. Howerton*, 59 Mo. 91; *State v. Hopper*, 27 Mo. 599; *State v. Chunn*, 19 Mo. 233. The true rule drawn from the whole body of the law appears to be this: Wherever the statute creates a crime and defines the facts which constitute it, there the language of the statute must be followed, and "equivalent" words won't do.

HENRY, J.—Section 9 Wag. Stat., page 468, provides for a case in which both the buyer and seller of counterfeit bank notes or coin know that they are counterfeits, and are equally guilty, and the words used descriptive of the offense are "sell, exchange or deliver," and "receive upon a sale, exchange or delivery." Section 21, page 471, contemplates a case where one party only is guilty, and the other is victimized by him. The words used descriptive of the offense are *pass, utter*, or *publish*. The defendant's counsel contends that the indictment under the latter section must use one of the words "pass," "utter" or "publish," and that the offense cannot be charged in any other language. In the case at bar every averment required by that section is made, and the specific acts charged when proven, unquestionably make out a case under that section, for they clearly constitute a passing, publishing and uttering. Is that sufficient? The counsel confidently relies upon *Vanvalkenburg v. The State of Ohio*, 11 Ohio 404; *Sherman Hutchins v. The State of Ohio*, 13 Ohio 198, and the *United States v. Nelson*, 1 Abbott's U. S. Rep. 135.

INDICTMENT: statutory language.

The case in the 11th Ohio decides that proof of uttering and publishing counterfeit bank notes as true and genuine, will not sustain an indictment for selling and bartering such notes. In the criminal code of Ohio there were two sections similar, almost identical with, our sections 9 and 21, and undoubtedly the court properly decided the case of *Vanvalkenburg v. The State.* The indictment charged one offense and the evidence proved another and different offense, defined in another section of the statute. The case in 13th Ohio reaffirms the case of *Vanvalkenburg v. The State of Ohio.* It may be remarked that in the latter case Birchard, J., dissented, and in a very able argument contended that the offense proven being of a lower grade than, and embraced in, that charged, the defendant could be convicted under that indictment for the less offense.

In the case of the *U. S. v. Nelson* the defendant was indicted for *passing*, *uttering* and *publishing* a counterfeit United States fractional note with intent to defraud the United States, and was convicted. The proof was that a person employed by the government officials as a detective applied to Nelson for counterfeit money, to be, by the detective, put in circulation. He sold to the detective four hundred and ten dollars of spurious United States notes, for which he received, in good money and a promissory note, one hundred and thirty-three dollars. When the testimony was offered it was objected that, on a charge for passing, proof of selling was inadmissible, but the objection was overruled, and that ruling formed the basis of a motion for a new trial. The act of Congress of June, 1864, defines the offense to be to utter, pass, publish or sell counterfeit United States notes, knowing them to be such, with intent to deceive or defraud. The indictment did not charge that defendant sold the notes. The court said: "The single question which I find it necessary to determine is whether, under the statute last referred to, any delivery of a spurious note to another for value, for the object or purpose of being passed or put

into circulation as and for money, is a passing within the meaning of the act of Congress;" and he determines the question in the affirmative. There, it will be observed, the defendant was charged with passing, uttering and publishing, and the proof was that the defendant sold to one who knew the notes to be counterfeit. In the case of the *State v. Mitchell*, 1 Baldwin, Mr. Justice Baldwin says: "The note is uttered when it is delivered for the purpose of being passed."

In the case at bar the indictment does not use the word "pass," but alleges acts done by defendant which constitute a passing, and employs words which in their common acceptation mean the same thing, and even technically are in some respects convertible terms; and when, in addition to the employment of those words, it alleges acts done which clearly constitute a passing of the forged draft, there can be no doubt of the sufficiency of the indictment; and with due deference to the able counsel we think that the cases in 11th and 13th Ohio are not applicable to the question involved in this discussion, and the case of *U. S. v. Nelson* supports the conclusion we have reached. We do not mean to say that the words pass, utter and publish, and the words sell, exchange and deliver, may be used interchangeably, but that where the latter words are used in connection with acts charged which clearly constitute the offense imputed by the former words, the indictment is sufficient. In support of these views we refer to *U. S. v. Batchelder*, 2 Gallison C. C. 15; *State v. Little*, 1 Vt. 331; *State v. Wilkins*, 17 Vt. 155; *Peck v. State*, 2 Humph. (Tenn.) 78; *State v. Smith*, 5 La. Ann. 340; *State v. Bullock*, 13 Ala. 413; *State v. Pennington*, 3 Head 119. Motion for rehearing overruled. All concur.

OVERRULED.

SCOTLAND COUNTY, APPELLANT v. THE MISSOURI, IOWA & NEBRASKA RAILWAY COMPANY.

1. **Taxation:** POWER OF LEGISLATURE TO GRANT EXEMPTION FROM. In the absence of constitutional restriction the legislature has power to grant exemption from taxation; but such exemption must be clear and unambiguous, or it will not be allowed.

2. **Corporation:** TAXATION: EXEMPTION OF STOCK EXEMPTS CORPORATE PROPERTY FROM. A railroad company whose stock is by law exempt from taxation, can not be taxed on property owned and used by it in the operation of its railway and necessary for that purpose. The stock is but the representative of the property.

3. **Railroad Charter constitutes a Contract.** A charter granted by the legislature and accepted by a railroad corporation, constitutes a contract between the State and the corporation, the obligation of which can not be impaired by a State constitution subsequently adopted.

4. **Taxation:** LEGISLATIVE EXEMPTION FROM: EFFECT OF SUBSEQUENT CONSTITUTIONAL PROHIBITION AGAINST EXEMPTIONS. The charter of a railroad company exempting the stock of the company from taxation, is not repealed by a constitutional provision adopted after acceptance of the charter, declaring that "no property shall be exempt from taxation, except," &c.

5. **Sec. 16 Art. 11 Constitution of 1865 construed.** Sec. 16 Art. 11 of the constitution of 1865 was not designed to withdraw existing exemptions from taxation. It was intended to operate prospectively only.

6. **Scope of general corporation and railroad laws of 1855.** The general purpose of the general corporation and railroad laws of 1855 (R. S. 1855 ch. 34 p. 369 and ch. 39 p. 404) and of the general corporation law of 1845 was to confer certain powers and privileges and impose certain duties and liabilities in the absence of any stipulations or provisions inconsistent with those, contained in special charters subsequently granted. Where such inconsistencies occur in subsequent legislation, it must be understood that previous restrictions were intended to be removed.

7. **Taxation:** EXEMPTION FROM: POWER OF LEGISLATURE TO WITHDRAW, CONSTRUCTION OF STATUTE. Sec. 7 of the corporation law (R. S. 1855 p. 371) declares that "the charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature." Sec. 56 of the railroad law (R. S. 1855 p. 438) declares that "the legislature may at any time alter or amend this act; but such alteration

or amendment shall not impair the rights of companies previously organized." Sec. 57 (Ib.) declares that in future "all railroad companies shall have all the privileges contained in this act." In 1857 the legislature chartered the Alexandria & Bloomfield railroad company by a special act, which exempted the stock of the company from taxation for a term of years. *Held*, that the right of amendment reserved to the legislature was that contained in section 56 only, and that the exemption could not be withdrawn after the company had organized.

Appeal from Scotland Circuit Court.—Hon. E. V. Wilson, Judge.

W. T. Kays for appellant.

By the 7th section of Chapter 34 Art. 1 R. S. 1855, the legislature reserved the power to alter, suspend or repeal the defendant's charter. *Pacific R. R. v. Renshaw*, 18 Mo. 210; matter of *Lee & Co.'s Bank* 21 N. Y., Rep. 9; *Commonwealth v. Fayette Co. R. R. Co.*, 55 Penn. St. 452; *State v. Person*, 3 Vroom. 566; 6 ib. 157; Angell & Ames on Corp. sec. 767. Sections 56 and 57 of the Railroad act were intended only to give the right to repeal the act of which they formed part, and to determine the effect of such repeal or alteration. The right to alter, etc., any special charter, is neither granted nor withheld by those sections. Hence this law is not repugnant to the general law embraced in chap. 34 art. 1, nor does it fully embrace the whole subject matter of that law. In so far as there is any conflict between sec. 7 chap. 34 art. 1, and sections 56 and 57 of the Railroad law of 1855, it amounts to this, that the latter law limits the former in its application to corporations formed under the latter law, and the former furnishes the rule governing alterations, etc., in all other cases. *Gordon's Ex. v. Mayor*, 5 Gill 231; *Beale v. Hale*, 4 Howard 37; Broom's Legal Maxims p. 21, side page 28, 5th ed; *Matter of the Reciprocity Bank*, 22 N. Y., 9.

A. J. Baker, P. E. Bland and Frank Hughes for respondent.

1. The exemption of the stock from taxation, exempts also the property, which the stock represents, and which is necessary to the transaction of the ordinary business of the corporation. *R. R. Co. v. Mayor*, 14 Geo. 279; *Mayor v. Balt. & O. R. R.*, 6 Gill 295; *New Haven v. City Bk.*, 31 Conn. 106; *State v. Tunis*, 3 Zab. 547; *State v. Bentley*, ib. 532; *Hann. & St. Jo. R. R. v. Shacklett*, 30 Mo. 550; *Augusta v. R. R. & Bk. Co.*, 26 Geo. 651.

2. The defendant by virtue of the consolidation, succeeds to the exemption from taxation contained in section 9 of the Alexandria & Bloomfield Railroad charter. *State ex rel. v. Green Co.*, 54 Mo. 551; *Phil. & Wil. R. R. v. Maryland*, 10 How. 376; *Tomlinson v. Branch*, 15 Wal. 460.

3. Neither the Constitution, art. 11 sec. 16, nor the act of March 10, 1871, providing a uniform system for assessing and collecting taxes from railroad corporations, repeals section 9 of the charter of the Alexandria & Bloomfield Railroad Company. Cooley on Const. Lim. 62, 63; Sedg. on Stat. and Const. Const. 167, 173, 161, note A; *Seamans v. Carter*, 15 Wis. 548; *State v. Atwood*, 11 ib. 423; *Finney v. Ackerman*, 21 ib. 268; *Garfield v. Bemis*, 2 Allen 446; *N. B. Bank v. Copeland*, 7 ib. 140; *Tilman v. Lansing*, 4 John. 45; *Bartruff v. Remey*, 15 Iowa 257; *Abingdon v. Duxbury*, 105 Mass. 287; *Armstrong, v. Hinds* 48 N. Y. 505; *Ely v. Holton*, 15 ib. 376; *Bailey v. Major*, 7 Hill 146; *Dash v. Van Kleek*, 7 Johns 477; *Sayre v. Wisner*, 8 Wend. 661; *State v. Auditor*, 41 Mo. 25; *State v. Macon Co. Ct.*, ib. 453; *McManning v. Farrer*, 46 ib. 376. Where an exemption by special enactment of specific property from taxation, has once been established, such exemption will not be held to be repealed by implication. The intention to repeal, must be as clearly expressed, as was the intention to exempt. *State v. Minton*, 3 Zab. 529; *State v. Bently*, ib. 532; *State v. Jersey City*, 2 Vroom. 575; *Williams v. Pritchard*, 4 D. & E. 2; *Fosdick v. Perrysburg*, 14 Ohio St. 485: *Brown v. Co. Comm.*, 21 Penn. St. 43; *Gregory's Case*, 6 Coke's Rep. 19; *Blain v. Baily*, 25 Ind. 165; *Clark v. Davenport*, 14 Iowa 494; *Burke v. Jeffreys*,

20 ib. 145; *Felt v. Felt*, 19 Wis. 193; *Mead v. Bagnall*, 15 ib. 156; *St. Louis v. Alexander*, 23 Mo. 483; *St. Louis v. Indp't Ins. Co.*, 47 ib. 146; *Deters v. Renick*, 37 ib. 597; *Vastine v. Probate Court*, 38 ib. 529; *State v. Miller*, 1 Vroom 369.

The Legislature, by the act of February 27, 1875, expressly withdrew this exemption. This shows that the understanding of that branch of the government is that direct legislation was necessary. See *Smith v. Clark County*, 54 Mo. 58.

4. If the act of March 10, 1871, was intended to apply to the defendant's charter, so as to repeal the exemption from taxation as contained in section 9, of said charter, then it is in conflict with the constitution of the United States, in this, it impairs the obligation of defendant's contract with the State of Missouri, as contained in said 9th section of the charter.

(*a*) An exemption from taxation — when not prohibited by the Constitution — may be made by a State Legislature.

(*b*) When such exemption is contained in a charter granted by a State Legislature to a corporation, it becomes, after the incorporators have accepted such charter, and organized under it, a contract with the State and is protected by the Constitution of the United States from alteration and repeal; UNLESS there is, in the charter itself, or in the general law in force at the time of its adoption and acceptance, and which general law is, by its terms, made applicable to *corporations formed under such charters*, a reserved right to make such alteration or repeal, and in the absence of any such reserved power on part of the legislature, any alteration or repeal which has for its object the repeal of such exemption, is void for repugnancy to the Constitution of the United States. *Dartmouth College v. Woodward*, 4 Wheat 518; *State Bank v. Knoop*, 16 How. 369; *Ohio Life Ins. and T. Co. v. Debolt*, ib. 416; *New Jersey v. Wilson*, 7 Cranch. 164; *Providence Bank v. Billings*, 4 Pet. 561; *Charles River Bridge v. Warren Bridge*, 11 Pet.

420; *Gordon v. Appeal Tax Court*, 3 How. 133; *State v. Mansfield*, 3 Zab. 510; *Gardner v. State*, 1 ib. 557; *Johnson v. Commonwealth*, 7 Dana 342; *Neustadt v. Ill. Cent. R. R.* 31 Ills. 484; *Bank v. New Albany*, 11 Ind. 139; *Home of the Friendless v. Rouse*, 8 Wal. 430; *Washington University v. Rouse*, ib. 439.

It remains only to inquire whether the Legislature has reserved such a right to itself. And this depends on the construction to be put on sec. 7 (R. S. 1855, p. 371) and secs. 56 and 57 (ib. 438).

The plaintiff claims that the liability of the defendant's charter to "*alteration, suspension or repeal*," is measured by the provisions of said section 7, and that by reason of such reserved authority the Legislature on the 10th day of March, 1871, had the power to repeal the exemption from taxation contained in plaintiff's charter, notwithstanding the fact the corporation had been organized previous to such repeal.

The defendant upon the contrary claims that the act of 1853, re-enacted and amended in 1855, covers the whole field as to railroad corporations, and is the law as to them in all matters wherein there is any conflict between said act, and the act of 1845, and that the 56th section of the law of 1855, applies as well to railroads formed under special charters, as to those organized under the provisions of that act.

The design indicated in sec. 57 *supra*, clearly was to place all railroads, so far as the same could be done without violation of the contract contained in their charter, on an equal footing, and that the act, so far as it could legally be made to do so, should apply alike to companies organized under special charters and those organized under that act.

If it is a PRIVILEGE to have exemption from taxation, and to have that immunity protected from legislative interference, then this section 57 has the effect of engrafting into the charter of every railroad company the

provisions of section 56, and to protect the companies organized under special charters, from amendment, after organization in such a manner as to effect any of their RIGHTS. That this is a privilege, see *Smith v. Clark County*, 54 Mo. 58; *State ex rel. v. Green County Court*, ib. 540.

The object of the State in granting this privilege must be kept in mind, viz: "to induce capital to invest in railroads which were to be constructed here, not so much with a view to furnish facilities to existing wealth and population and commerce, as to create them in a wilderness," as said by Napton J. in *Lackland v. N. Mo. R. R. Co.* To this end it was necessary to guarantee protection to capital. Section 7 *supra* seemed a standing menace, authorizing, as it did, a repeal of any charter. See *Renshaw v. Pacific R. R.* It was to remove this danger that section 56 was passed, guaranteeing vested rights in railroad corporations.

It is true that the "act concerning corporations" at one time, covered the whole field of corporations. That was, however, before the Legislature had passed any laws classifying the different kinds of corporations, making provision for the government of each particular class. When, however, this was done, it was an expression of the legislative will that, so far as this class of corporations was concerned, it should be taken from under the operation of this general law of corporations, and be governed by provisions specially applicable to its class. This railroad corporation law is, as to the "act concerning corporations," a special or particular statute in this, that it selects from the numerous kinds of corporations covered by this latter act, a particular class, and provides for their formation and government.

It is a general law, in so far as it applies to all corporations formed, or to be formed, for the purpose of constructing and operating railroads. It is as to that class of corporations, a *revision* of, or substitute for, the law of *corporations* and not an *amendment*, and being a subsequent statute on that subject, it repeals the first to the extent to

which its provisions are revised or substituted. *Tyler v. City of St. Louis*, 56 Mo. 64; *United States v. Tynen*, 11 Wal. 88; *Henderson's Tobacco*, ib. 652; *Murdoc v. Memphis*, 20 Wall. 590; 2 C. L. J. 135; *Pierpont v. Crouch*, 10 Cal. 315; *Bartlett v. King*, 12 Mass. 555; *Nichols v. Squire*, 5 Pick. 168; *Rogers v. Watrous*, 8 Tex. 62; *Daviess v. Fairbairn*, 3 How. 636; *Leighton v. Walker*, 15 Ills. 59; *Larrabee v. Baldwin*, 35 Cal. 155; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 150.

NAPTON, J.—The points arising in this case are presented by an agreed statement of facts, which is as follows:

1st. That by an act of the General Assembly of the State of Missouri, entitled an act to incorporate the Alexandria & Bloomfield Railroad Company, approved February 9th, 1857, the Alexandria & Bloomfield Railroad Company became and was duly incorporated, possessed of all the powers, privileges, rights, immunities, exemptions, franchises and properties, and subject to all the liabilities, obligations and restrictions mentioned in said act. 2d. That on the 13th day of September, A. D. 1864, said company was duly organized and directors elected, as required by section four of said act, and immediately said company commenced and proceeded to carry on its proper business and railroad operations, under the privileges and conditions in said act mentioned. 3d. That by an act of the said General Assembly, entitled "an act to amend an act entitled an act to incorporate the Alexandria & Bloomfield Railroad Company," approved February 9th, 1857," which said amendatory act was approved February 19th, 1866, and by the due acceptance of the first section of said amendatory act the corporate name of said railroad company was changed to that of the Alexandria & Nebraska City Railroad Company. 4th. That in pursuance of the general laws of the States of Missouri and Iowa, authorizing the consolidation of railroad companies, owning connecting railroad lines in said States, the

said Alexandria & Nebraska City Railroad Company, on the 3d day of May, 1870, duly and legally consolidated with the Iowa Southern Railway Company, a railroad company duly organized and incorporated and existing under the laws of the State of Iowa, and that thereafter the said Alexandria & Nebraska City Railroad Company and the said Iowa Southern Railway Company became merged and consolidated into and formed one company, under the corporate name of Missouri, Iowa & Nebraska Railway Company, this defendant. 5th. That in pursuance of the laws of Missouri, passed and approved March 10th, 1871, providing for uniform assessment and collection of taxes upon railroad companies owning railroads within this State, the President of the said Missouri, Iowa & Nebraska Railway Company made report to the Auditor of the State of the amount of completed road in the various counties in this State and valuation thereof, belonging to said railway company, as required by said act. 6th. It is further agreed that prior to the passage of said act of March 10th, 1871, no notice was given to the President and Secretary of said Missouri, Iowa & Nebraska Railway Company, or either of them, of any intention upon the part of the Legislature of said State of Missouri to in anywise alter, amend or repeal any of the provisions of the said Alexandria & Bloomfield Railroad charter, nor of the said Alexandria & Nebraska City Railroad charter, nor of the said Missouri, Iowa & Nebraska Railway charter, and it is agreed that no notice of any kind whatever was given to the said president and secretary by the said Legislature or any one else, of any intention on the part of the said Legislature to in anywise change or affect any of the provisions of said charters, nor was any notice ever given to any of the Presidents or Secretaries of said Alexandria & Bloomfield or said Alexandria & Nebraska City Railroad Companies, except the provisions of the Constitution of the State of Missouri, adopted in 1865, to-wit: Section 16, article 11 of said Constitution. 7th.

That the valuation of all the property owned by said Missouri, Iowa & Nebraska Railway Company within the State of Missouri, upon said railway running from the City of Alexandria, in Clark county, to the Iowa State line between Missouri and Iowa, will not exceed one million dollars, and that not more than that amount of stock has been issued or existing upon said line of road. 8th. That all the property upon which the tax has been levied, and mentioned in plaintiff's petition, is property necessary for the use and operation of said railway, and is used for no other purpose. 9th. That the true valuation of all property owned by said railway company, lying in the said county of Scotland, upon which tax has been levied, is $138,115.00, and that said amount was duly certified by the Auditor of the State of Missouri to the clerk of the county court of the said Scotland county, on the 24th day of July, A. D. 1872. 10th. It is further agreed that if the Court shall find that the said defendant is and was liable to pay county taxes to the said county of Scotland for the year 1872, then the Court shall render judgment against the defendant for such taxes in the sum of two thousand three hundred and forty-seven dollars and ninety-five cents, ($2,347.95), and interest thereon from December 31st, 1872, according to law. 11th. It is further agreed that if the court shall find that the said defendant is, and was, liable to pay school taxes to said county of Scotland for the year 1872, in that case the court shall render judgment for such taxes in the sum of one thousand and ninety-one dollars and sixty-six cents, and interest thereon from December 31st, 1872, as provided by law. 12th. It is further agreed that nothing in this agreement shall estop the said defendant from hereafter showing any mistake which may appear in the amount of taxes as hereinbefore set forth, which the said defendant shall be held liable to pay, but the regularity of the levy and assessment made by the County Court of Scotland county and State Board of Equalization, shall in no wise be called in question.

Given under our hands on behalf of said plaintiff and defendant, the 5th day of May, 1874.

Whereupon the plaintiff moved the Court to make the following declarations of law: 1st. There was no consideration for the grant of the charter of the Alexandria & Bloomfield Railway Company, or for the exemption from taxation claimed under the same, and that therefore there was no contract between the State and said Company as to said exemption. 2d. That by the 7th section of chapter 34, article 1, of the revised statutes of 1855, the Legislature reserved the power to amend, alter, or repeal the exemption from taxation claimed under said charter; and that the Legislature, or a Convention called to form a Constitution for the State of Missouri, by virtue of said reservation had the power to repeal said exemption, without notice to the secretary or president of the company. 3d. That said exemption from taxation claimed in defendant's charter, was repealed by the Constitution of Missouri, adopted the 4th day of July, in the year 1865, and the act of the Legislature passed in pursuance thereof; and that said company is liable for the tax mentioned in plaintiff's petition, by virtue of the act approved March 20th, 1871. 4th. That upon the agreed statement of facts in this cause, plaintiff is entitled to recover the amount of tax with interest, as stated in plaintiff's petition. 5th. The section in defendant's charter exempting defendant's stock from taxation for the period of twenty years from its completion, is to be strictly construed, and does not thereby exempt the real, personal, or mixed property of defendant, but at most only the stock in the hands of individual stockholders. 6th. That the defendant, by the consolidation of the Alexandria and Nebraska City Railway Company, and the Iowa Southern Railway Company did not succeed to all the rights, privileges and immunities of the Alexandria and Bloomfield Railway Company. Which motion was by the court overruled, and to which order of court the plaintiff at the time excepted.

And thereupon, the defendant moved the court to make the following declarations of law:

1st. The charter of the Alexandria and Bloomfield Railroad Company, after the acceptance by and organization of said company under the same, constituted a contract between the State and said company for exemption from taxation for a period of twenty years from the completion of said Railroad, of all the property of said company necessary for the operations of said railroad, and the property sought to be taxed in this case is within the said contract and is exempt from taxation by the plaintiff. 2d. That the defendant by the consolidation of the Alexandria and Nebraska City Railroad Company (the old Alexandria & Bloomfield Railroad Company) and the Iowa Southern Railway Company, became entitled to exemption for twenty years, as to all that portion of its railroad in this State, which belonged, or would have belonged to the said Alexandria & Bloomfield Railroad, and necessary to its operations as a railroad, and as the property in controversy pertaining to that portion of the consolidated company belonged, or would have belonged to said Alexandria & Bloomfield Railroad Company, the same is exempt from taxation and the plaintiff is not entitled to recover. 3d. That the act of the legislature, under which the plaintiff asks to tax the property in controversy is unconstitutional in this, that it impairs the obligation of the contract of the State with the said Alexandria & Bloomfield Railroad Company as to the rights, privileges and exemptions to which the defendants succeeded by the consolidation, within the meaning of section 10, article 1 of the Constitution of the United States. 4th. The Legislature did not reserve the right to alter, amend or repeal the charter of said Alexandria & Bloomfield Company after the organization of said company. 5th. If the Legislature had reserved the right to alter, amend or repeal the said charter after notice to the president or secretary, then, before any amendment, alteration or repeal could be made, said notice

would have to be given, and the company could not be affected except by such notice. 6th. That upon the agreed statement of facts the plaintiff cannot recover, and the judgment should be for the defendant. Which motion was by the court sustained, to which order the plaintiff at the time excepted, whereupon the court rendered judgment in favor of defendant.

1. TAXATION: power of legislature to grant exemption from.

It was at one time a question of considerable doubt whether a Legislature could divest itself or its successors of the power of taxation; but it may be considered as settled now that legislative bodies have the power by selecting the subjects of taxation and excluding or exempting other subjects which they had the power to tax, to hold out inducements to proposed investment of capital unless there is some constitutional restriction. The subject is referred to and somewhat discussed in the case of the *State Bank of Ohio v. Knoop*, 16 How. 369, and *Dodge v. Wolsey*, 18 Howard 331. It is agreed, on all hands, that the exemption must be clear and unambiguous. The exemption claimed in this case depends on the construction of the ninth section of the defendant's charter adopted in 1857. That section is as follows:

"The stock of said company shall be exempt from taxation for the period of twenty years after its completion."

2. CORPORATION: taxation: exemption of stock exempts corporate property from.

In accordance with the decision of this court in the case of the *H. & St. Joe R. R. Co. v Shacklett*, 30 Mo. 550, supported as it is by numerous decisions in other states, it is clear that a tax on the property represented by the stock is substantially a tax on the stock. It is simply respectful to the Legislature to assume that a valuable privilege was designed to be conferred by this section, but if the exemption of the stock did not extend to the property which the stock represented, the section was purely illusory.

That the present defendant succeeded to all the privileges and liabilities of the Alexandria & Bloomfield Com-

3. RAILROAD CHARTER CONSTITUTES A CONTRACT.

4. TAXATION: legislative exemption from: effect of subsequent constitutional prohibition against exemptions.

pany is conceded. It is insisted, however, that Sec. 16 Art. 11 of the Constitution of 1865, operated to repeal the exemption contained in defendant's charter. This section is as follows: "No property, real or personal, shall be exempt from taxation, except such as shall be used exclusively for public schools, and such as may belong to the United States, this State, the counties, or to municipal corporations within the State."

It is not now maintained by any judicial tribunal that a change in the political form of civil society has the magical effect of dissolving its moral obligations or impairing contracts previously vested. Constitutional Conventions, which are of frequent occurrence in many of our States, it is believed, have no more power over vested rights than ordinary Legislatures. It must be remarked, however, that upon well settled rules of construction, this 16th section was evidently designed to be prospective and not retrospective in its operation, and it would be an unjust imputation on the convention which framed that Constitution to infer that they designed that section to operate upon existing rights.

5. SEC. 16 ART. 11 CONSTITUTION OF 1865 CONSTRUED.

Another question discussed in this case is whether the act of 10th of March, 1871, was intended to repeal the 9th section of defendant's charter; and this leads to an examination of the principal question in the case, which relates to the construction of the 7th section of the act concerning corporations, found in the revisions of 1845 and 1855, which declares that "the charter of every corporation that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal, in the discretion of the Legislature." This general law concerning corporations consisted originally of only two articles, the first of which related to the general powers, privileges and liabilities of corporations, and the second provided modes of procedure against them. There was no statute at that time classifying corporations, and probably every private corporation

in the State was created by a special act. As early as 1853, however, and certainly in the revision of 1855, this classification took place, dividing corporations into benevolent associations, fund associations, mining, manufacturing, &c., associations, plank-road associations, and railroad corporations. The general statute, the 7th section of which has been copied above, was still retained in the code. The chapter concerning railroad corporations is more extensive than either of the others, and section 56 is as follows: "The Legislature may at any time alter or amend this act, but such alterations or amendment shall not impair the rights of companies previously organized, or take away, or impair any remedy given against such corporations, its stockholders or officers, or any liability which shall have been previously incurred." The next section is as follows: "All existing railroad corporations within the State, and such as are now or may be hereafter chartered shall respectively have and possess all the powers and privileges contained in this act, and they shall be subject to all the duties, liabilities and provisions contained in this act, not inconsistent with the provisions of their charters."

6. SCOPE OF GENERAL CORPORATION AND RAILROAD LAWS OF 1855.

It is now insisted, on the part of the plaintiff, that the charter of defendant in 1857 was subject to the 7th section of the general act, concerning corporations above quoted, and therefore subject to suspension, alteration and repeal, in the discretion of any succeeding Legislature. This position can only be maintained by the assumption that the act of 1857, which constitutes defendant's charter, is entirely consistent with this provision in the acts of 1845 and 1855, for it will hardly be contended that one Legislature can bind its successors, and if the Legislature of 1857 thought proper to disregard this provision in the acts of 1845 and 1855, there is no principle upon which such power could be questioned. The 11th section of defendant's charter provides: That "said company shall commence the construction of said road

7. TAXATION: exemption from: power of legislature to withdraw, construction of statute.

within ten years after the passage of this act, and complete the same in ten years thereafter." By section 6 of the general corporation law of 1845 and 1855, it is provided that, "if any corporation hereafter created by the Legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease." In addition to this section in the general corporation law, section 55 of the chapter concerning railroad corporations, provides that "if any corporation formed under this act shall not within two years after its articles of association are filed and recorded in the office of the Secretary of State, begin the construction of its road and expend thereon ten per cent. on the amount of its capital, or shall not finish the road and put it in operation in five years after filing its articles of association as aforesaid, its corporate existence and power shall cease." This charter of 1857, it is clear, is totally irreconcilable with the provisions just quoted, for defendant was allowed by its charter ten years to commence, and then ten years to complete the road. Without going into any detailed examination of the various provisions of these general laws of 1845 and 1855, it is sufficiently obvious that their general object was to confer certain powers and privileges and impose certain duties and liabilities in the absence of any stipulations or provisions inconsistent with those, contained in special charters subsequently granted. Where such inconsistencies occur in subsequent legislation, it must be understood that previous restrictions were intended to be removed, for reasons satisfactory to the Legislature. In view of the conclusion we have reached in regard to the effect of the 7th section of the general corporation law upon the 9th section of defendant's charter, the question so elaborately discussed by counsel, concerning the intent of the Legislature by the act of 10th of March, 1871, seems unnecessary to be passed upon, since it is clear that whether said law was designed to include the property of defendant

or not, it could not have that effect upon the facts in the agreed case. Judgment affirmed; all concurring.

AFFIRMED.

WILLET ET AL., PLAINTIFFS IN ERROR, v. BROWN.

1. **Dower**: PARTNERSHIP REAL ESTATE. A widow is not entitled to dower of real estate bought and improved with partnership funds by a firm, of which her deceased husband was at the time a member, and held and treated by them as partnership property, and sold after his death to pay the debts of the firm, which was insolvent, notwithstanding the title was taken in the name of the individual members and not of the firm.
2. **Trust for Payment of Partnership Debts.** Real estate so purchased and treated is to be deemed, so far as the legal title is concerned, as estate held in common and not in joint tenancy; but as to the beneficial interest it is held in trust, each holding his property in trust for the partnership until the partnership account is settled, and the partnership debts are paid.
3. **Dower Act Construed.** The statute (Wag. Stat. 542 sec. 23) which provides that "the widow shall have dower of the real estate of her husband and * * * although the same may have been held by him as joint tenant or tenant in common or copartner," has no application to real estate charged with such a trust.

Error to Cass Circuit Court.—HON. F. P. WRIGHT, Judge.

A. Comingo for plaintiffs in error.

I. In order to exclude dower in real estate conveyed to copartners, by their respective names, it must have been acquired with partnership funds, strictly as partnership property, and must have been held exclusively for partnership uses; or, it must have been acquired by the partners under an agreement, or with an express understanding that it should be held and sold for the benefit of the partnership and as partnership property. *Smith v. Jackson*, 2 Edwards Chancery 28; *Buchan v. Sumner*, 2 Barb. Chancery 165,

200, 201; *Delmonico v. Guillaume*, 2 Sanf'd Chancery 366; *Averill v. Loucks*, 6 Barb. 19; *Buckley v. Buckley*, 11 ib. 43; *Wooldridge v. Wilkins*, 3 How. Missis. 360; *Markham v. Merrett*, 7 ib. 437; *Wheatley v. Calhoun*, 12 Leigh. 264.

II. The Court erred in the declaration of the law of the case, given of its own motion. There is no testimony in the case, proving or tending to prove, that the property described in the petition was purchased by the partners to be used and applied to partnership purposes, nor any showing or tending to show that it was treated by the partners as a part of their partnership stock. Furthermore the Court declares, of its own motion, that, "if the property was purchased with the partnership funds, that fact of itself created a trust which attached to it, in the hands of the partners, in favor of partnership creditors." The facts disclosed by the record do not warrant this declaration, as to the law of the case. *Smith v. Jackson*, *Markham v. Merrett* and *Wheatley v. Calhoun*. (*Supra.*) But even admitting that the real estate was held by Silas Price and Charles Keller, in such a manner as to render it subject to the payment of partnership debts, and, under suitable proceedings and adjudications, to exclude dower, it does not appear that plaintiff's dower is excluded. In order that it might be excluded, she should have been made a party to the proceedings for a sale of the real property to pay the partnership debts. Otherwise, her claim for dower is not affected by the sale. *Pugh v. Currie*, 5 Alabama 446; *Collins v. Warren*, 29 Mo. 236.

N. M. Givan and D. K. Hall for plaintiffs in error.

I. If partners carrying on a trade or business, purchase real estate, essential to the very prosecution of such trade or business, such as mill sites, store houses, &c.; or if there is a contract or agreement express or implied between them, that the lands so held shall be converted into the stock of the partnership at its dissolution (neither of which appears

in the case at bar), the better opinion seems to be that it will be changed into personalty and liable as such for the partnership debts. But if, on the other hand (as in the case at bar), the ownership by partners of such realty is in no way connected with the very business of their trade, or if it is only collateral to, and not growing out of their trade, the authorities are clear and conclusive that it retains its original character. *Buckeridge v. Ingram*, 2 Ves. jr. 652; *Smith v. Smith*, 5 Ves. 189; *Ripley v. Waterworth*, 7 Ves. 425; *Phillips v. Phillips*, 1 Mylne & Keene, 649; 7 Cond. Eng. ch. 208; *Brown v. Brown*, 3 M. & K., 443; 9 Eng. ch. 118; *Randall v. Randall*, 7 Simons 271; *Coles v. Coles*, 15 Johns. 159; *McDermot v. Lawrence*, 7 Serg. & Rawl. 438; *Greene v. Greene*, 1 Ohio 244; *Sigourney v. Munn*, 7 Conn. 11; *Gow on Part.* 2nd Ed. pages 49, 50, 51 and note on page 51.

It is insisted that the principle here contended for is sustained by reason, justice and equity as well as by the decisions of the courts. Messrs. Price & Keller were partners in the general mercantile business at the time the real estate in question was purchased. They were not in the business of buying and selling of real estate; that constituted no part of their partnership business. The real estate in question was not used as a store house, nor was it in any manner connected with their partnership business. It was bought by and conveyed to them as individuals in 1852. The partnership was not dissolved by the death of Price until 1859. It would have been perfectly competent and proper for the members of the firm to have withdrawn from the business of the firm any reasonable amount of money, and with it to have bought real estate for, and had it conveyed to each of them separately, and such real estate would not have been thought of as personal property. If so, why should real estate conveyed to them jointly as tenants in common, as individuals, having no connection with, or relation to their partnership business, be governed by a different rule?

II. The distinction between partnership and tenancy

in common should not be ignored. The fact that the tenants in common of the legal title are co-partners does not, of itself, invest the realty with any of the characteristics of personalty. Partners may, like other persons, join in a purchase of realty independent of their partnership, intending to hold their interests severally. Whenever such an intention exists, the property, though paid for out of the moneys or effects of the firm, retains in equity, as well as at law, the character of real estate. *Freeman on Co-ten. and Part.*, secs. 111, 112, 114; *Hunt v. Benson*, 2 Humph. 459; *Dyer v. Clark*, 5 Met. 562; *Smith v. Smith*, 5 Ves. 193; *Coder v. Huling*, 27 Pa. St. 88; *Collumb v. Read*, 24 N. Y. 513. The deed to the individual partners, their heirs and assigns, and the testimony taken together clearly show there was no intention to impress upon this real estate the character of personalty. The mere fact that payment is made out of the partnership funds is not even *prima facie* proof of the conversion of real into personal estate. It must be shown in addition to this fact that the purchase was connected with the firm business, or was in pursuance of some agreement, that it should be held for the benefit of the concern. *Freeman on Co-tenancy and Part.* sec. 115; *Smith v. Jackson*, 2 Edw. Ch. 28; *Cox v. McBurney*, 2 Sandf. 561; *Wooldridge v. Wilkins*, 3 How. Miss. 360.

III. The Court found that Price and Keller held said real estate as tenants in common, and our statute expressly clares that "The widow shall have dower of real estate, although there may have been no actual possession by the husband in his lifetime, and although the same may have been held by him as joint tenant, or *tenant in common*, or co-parcener." Wag. Stat., p. 542, sec. 23. This section became the law of this State since the decision by this Court of *Carlisle's adm'rs v. Mulhurn*, 19 Mo. 56, and *Duhring v. Duhring*, 20 Mo. 174, and is decisive of the case in favor of plaintiffs.

Wooldridge & Daniel for defendant in error.

1. The widow of a deceased partner is not entitled to

dower in that part of the partnership lands which are necessary for the payment of partnership debts. *Sumner v. Hampson*, 8 Ohio 328; 1 *Parsons on Contracts*, 151, 5th Ed.; *Duhring v. Duhring*, 20 Mo. 174; *Goodburn v. Stevens*, 5 Gill 1; *Richardson v. Wyatt*, 2 Dessaus. 471; *Wooldridge v. Wilkins*, 3 How. Miss. 360; *Burnside v. Merrick*, 4 Met. 541; *Dyer v. Clark*, 5 Met. 562; *Hale v. Plummer*, 6 Ind. 121.

2. Real estate purchased with partnership funds is, so far as the partners and their creditors are concerned, treated in equity as personal property; and the widow of a partner has dower only in what remains after the payment of the partnership debts and the adjustment of the claims of the partners. 1 *Parsons on Con.*, 149, 5th Ed.; *Goodburn v. Stevens*, 5 Gill 1; *Buchan v. Sumner*, 2 Barb. Ch. 165, 192, 207; *Benkley v. Benkley*, 11 Barb. 14; *Piatt v. Oliver*, 3 McLean 27; *Rice v. Barnard*, 20 Vt. 479; *Overholt's Appeal*, 12 Penn. St. 222; *Moderwell v. Mullison*, 21 Id. 257; *Buck v. Winn*, 11 B. Mon. 322; *Owens v. Collins*, 23 Ala. 837; *Boyers v. Elliott*, 7 Humph. 204; *Hoxie v. Carr*, 1 Sumner 182, 4 Ohio St. 1; *Story on Partnership*, § 93; *Carlisle's Adm'rs v. Mulhern*, 19 Mo. 56; *Duhring v. Duhring*, 20 Mo. 174; *King v. Wilcomb*, 7 Barb. 263; *Denning v. Colt*, 3 Sandf. 284. It is immaterial that the property was conveyed to the partners, Silas Price and Charles Keiler, *eo nomine*. The creditors of the firm had a right to look to it for payment of their just demands, and neither the form of conveyance, nor the fact of its being used or not used by the firm in the transaction of their partnership business could affect their rights. *Wash. Real Prop.*, 3d Ed. 575, sec. 3; *Menagh v. Whitwell*, 52 N. Y. 146, S. C. 11 Amer. R. 683.

Norton, J.—This is a suit instituted by plaintiff, Mary E. Willet, as the former wife of one Silas Price, for the assignment of dower in certain lots in the town of Harrisonville, in Cass county, and for the recovery of damages for the deforcement thereof. It is alleged that her former husband, Silas Price, was seized of an estate of inheritance

in said lots, during their marriage, and that defendant, by virtue of a sale of the same, made after the death of said Price, by him, as the administrator of the partnership estate of S. Price & Co., conveyed said lots by administrator's deed, in February, 1861, to Alexander Feely, who afterwards conveyed the same to Barton Holderman, who afterwards conveyed to Alexander McLorky, who afterwards, in July, 1867, conveyed to Lititia Jones, who afterwards, in December, 1867, sold and conveyed the lots in question to the defendant, Robert A. Brown.

Defendant, in his answer, alleged that the lots in which dower is demanded by plaintiff were purchased by the firm of S. Price & Co., a partnership composed of Silas Price and Charles Keller, with partnership funds for the purposes of said partnership. That they were treated, held, owned and considered by said firm as partnership property, and that after the death of said Silas Price, they were sold as stated in the petition by defendant, as the administrator of the partnership estate of said S. Price & Co., for the purpose of paying partnership debts, and that said partnership estate was insolvent and insufficient to pay the debts of said firm. The replication denies all the averments of the answer except the one charging the insolvency of the firm of S. Price & Co., and one charging that the lots were sold to pay partnership debts. Upon a trial of the cause, the Court rendered judgment for the defendant from which plaintiffs have appealed.

As the error complained of is based upon the action of the Court in giving and refusing instructions, we copy them herein.

1st. If the Court, sitting as a jury, shall find from the evidence that the real estate in the petition described was purchased by the firm of Silas Price & Co., and conveyed to Silas Price and Charles Keller; that they composed the firm of Silas Price & Co.; that said real estate was paid for by said partners with partnership funds, then said Price

and Keller thereby became the owners of and held said real estate as tenants in common.

2d. If the Court, sitting as a jury, further finds that said Price has departed this life, that plaintiff, Mary Willet, was the wife of said Price, the Court, sitting as a jury, will find the issues for the plaintiffs, notwithstanding it may appear that said real estate was purchased by said firm and paid for out of the partnership funds, unless it shall further appear that it was purchased by said firm for its use in carrying on and transacting its partnership business.

The first of these instructions was given, the second was refused, and the Court, of its own motion, gave the following:

The Court, sitting as a jury, declares the law to be, that, though the said Silas Price and Charles Keller, composing the partnership firm of Price & Co., purchased the real estate described in the petition, with partnership funds, and by reason of such purchase held the same as tenants in common; yet they held the same in trust for the payment of partnership debts and liabilities; and if the Court finds from the evidence and the admissions in the pleadings that said property was purchased out of the partnership funds, to be used and applied to partnership purposes, and that the same was treated by said partners as a part of said partnership stock, and that said partnership was insolvent at the time of the death of said Price, and that it became necessary to sell said property, and the same was sold for the purpose of paying the partnership debts, then the plaintiff is not entitled to dower in the same, and the finding will be for the defendant.

The instruction given by the Court of its own motion, seems to be fully warranted by the cases of *Carlisle, admr. v. Mulhern & Keyser*, 19 Mo. 56. *Duhring v. Duhring*, 20 Mo. 174. In the former case the question before the Court was identical in principle with the one presented here. The contest was between the administrator of Carlisle, and Keyser the administrator

1. DOWER: partnership real estate.

of the partnership estate of Carlisle & Keyser, as to the disposition of a fund, the proceeds of the sale of a leasehold interest in real estate which had been acquired with partnership funds of the firm of Carlisle & Keyser. Gamble, Judge, who delivered the opinion, observes: "It is insisted that as the lease in this case was made to David Carlisle and Rufus Keyser, in their individual names, it was not partnership property. It appears sufficiently that these partners, being brick-makers and brick-layers, acquired their interest in the property by the advance of partnership money as an investment of so much of their partnership funds, to be held for their joint benefit. There has been some contrariety of decision in the English and American courts upon the question, of whether freehold estates in land purchased by a partnership with their joint funds, became partnership property to be treated as a fund for the payment of partnership debts. Without a labored examination of these decisions, the result of the authorities may be stated to be that real estate purchased out of partnership funds to be used and applied to partnership purposes, and treated and considered by the partners as partnership stock, is to be deemed and considered, so far as the legal title is concerned, as estate held in common and not in joint tenancy; but as to the beneficial interest it is held in trust, each holding his property in trust for the partnership until the partnership account is settled and the partnership debts are paid. It is a trust arising from actual or implied agreement of the parties, and from the mutual relation in which they stand to each other." It is true that there was no question of dower in that case, but the declaration of the court that the estate, although held by the partners as tenants in common, was chargeable in their hands with a trust for the benefit of creditors, and the payment of partnership debts, would preclude dower and the claim of the heirs of either of the tenants in common, until the partnership accounts were settled and partnership debts paid. So also in the case of

Duhring v. Duhring, 20 Mo., 174, it was declared by Ryland, Judge, "that the widow was not endowable of real estate belonging to the firm which was purchased by the partners for partnership purposes with partnership funds. The real estate purchased by the partners must be considered so far as is necessary to pay the debts of the firm, partnership stock and liable to the rules and regulations incident to personal property." After an exhaustive review of the authorities, to many of which we have been cited in this case, the Court reached the conclusion announced, that when lands are purchased by partners with partnership funds for partnership purposes, the policy of the law and principles of justice are against the right of the wife to dower in such lands, and the weight of authority, both English and American, is decidedly against such right. The leading authorities to which we have been cited by counsel were extensively reviewed by the Court in the above case, and in remarking upon the doctrine laid down in the case of *Smith v. Jackson*, 2 Ed., Chy. R. 28; *Thornton v. Dixon*, 3 Bro., Chy. R. 199; *Bell v. Phyn*, 7 Vesey 453; *Balmain v. Shore*, 9 Vesey 500, that an agreement between the partners was necessary to be shown that real estate of the partnership should be treated as personalty before it could be so treated, Ryland, J., observes that he doubts the accuracy of that ruling and approvingly quotes from 3 Kent 38, where it is said: "The decisions maintaining this doctrine appear to me to be a sacrifice of a principle of policy, and above all of a principle of justice to a technical rule of doubtful authority. There is no need of any other agreement than what the law will necessarily imply from the fact of an investment of partnership funds by the firm in real estate for partnership purposes. If the partners mean to deal honestly, they cannot have any other intention than the appropriation of the investment, if wanted, to pay the partnership debts.

The instruction given by the court of its own motion incorporated the principle above announced; for as a pre-

2. TRUST FOR PAYMENT OF PARTNERSHIP DEBTS.

requisite to a finding for defendant, it required that the court should first find that the real estate was purchased with partnership funds for partnership purposes, that it was treated by said partners as a part of the partnership stock, that the partnership was insolvent and that the real estate was sold to pay its debts. It is, however, said there was no evidence that the lots in question were bought for partnership purposes, and for that reason the instruction should not have been given. If the evidence of Keller, the other partner, was alone to be considered, there might be some force in the objection. He swears that the lot in question was bought with the money of the firm, that a two story house was built upon it with partnership funds, which he occupied as a residence, that there was no agreement between him and Price that it should be considered partnership property, and that it was not considered partnership stock, that the partnership was formed to engage in mercantile pursuits, that there were no written articles of partnership and no agreement to engage in buying real estate. On the other hand the bill of exceptions which does not contain a detailed statement of the evidence of defendant states that it tended to prove that the lot in question, and a large number of other lots and farming lands were bought by Price & Keller, paid for out of the partnership funds and were conveyed to Silas Price and Charles Keller, and were by them considered and spoken of as partnership property. The evidence seems to establish the fact that the partnership was formed in 1848, that the lot in question was purchased with partnership funds, and improved out of the same funds in 1852, that the partnership was dissolved by the death of Price in 1859; that during its continuance other lots and farming lands were purchased with partnership funds and conveyed to Silas and Charles, and were treated and considered by them, as well as the lots in controversy, as partnership property, and that all of the real estate thus purchased was sold to pay partnership debts, that in dispute having

been sold for that purpose in 1861, the estate of the partnership being wholly insolvent. Now, if Price & Keller treated, considered and held out to the world the real estate thus bought and improved with the money of the firm, as property and assets of the partnership, and impressed upon it by their own acts the liabilities incident or attaching to partnership property, their heirs and representatives ought not to be heard in a complaint, that a court of equity should not recognize and enforce a trust which the ancestor by his conduct had impressed upon the property. An agreement between Price & Keller to buy real estate for the use and purposes of the firm might very well be inferred from what was said by the partners, and that they considered and treated it as partnership property or assets of the firm.

It is argued as a further objection to the action of the trial court in giving the instructions complained of, that sec. 23, Wag. Stat., 542, provides "that the widow shall have dower of real estate, although there may have been no actual possession by the husband in his life time, and although the same may have been held by him as partner." We cannot give to this statute such a construction as to make it declare that the widow of a tenant in common who holds real estate charged with a trust expressed either on the face of the conveyance under which he holds, or which is raised by legal implication from its being expressed on the face of the transaction itself, though not expressed in the deed, would be entitled to dower in such estate. Judgment affirmed with the concurrence of the other Judges, except SHERWOOD, C. J., absent.

3. DOWER ACT CONSTRUED.

AFFIRMED.

STATE OF MISSOURI v. BRANSTETTER, APPELLANT.

1. **Practice, criminal:** INSTRUCTIONS. It is the duty of the court in the trial of a criminal case to give proper instructions, defining each crime of which under the indictment the accused can be convicted, and of which there is evidence in the case.

2. ——, ——: ——: MURDER: MANSLAUGHTER: EXCUSABLE HOMICIDE. When upon a trial for murder there is evidence given tending to show that deceased used personal violence toward the accused, the court should by proper instructions define the crime of manslaughter as well as murder and excusable homicide, though the defense fails to ask such instructions.

3. **Criminal law:** EVIDENCE. When the State has put in evidence in a criminal case, an admission of the accused made in the course of a conversation, the accused is entitled to have the whole of the conversation concerning the subject matter of the prosecution go to the jury.

4. **Jury:** VERDICT: MISCONDUCT. It is such misconduct as will invalidate a verdict in a criminal case, if the jury arrive at it through an agreement that each juror shall designate the term for which he thinks the defendant should be imprisoned, that the aggregate of these figures shall be divided by twelve and this quotient shall be the verdict.

5. **Misconduct:** WITNESS: JUROR. A member of the jury is not a competent witness to prove such misconduct.

Appeal from Audrain Circuit Court.—HON. GILCHRIST PORTER, Judge.

W. O. Forrist, McFarlane & Trimble, for appellant.

1. It is misconduct on the part of a jury, in arriving at a verdict in a case of felony, to agree among themselves that each juror shall secretly ballot a number, representing the number of years that he thinks the accused should be confined in the penitentiary, and that the twelve numbers thus secretly balloted shall be added together, and the sum thereof shall be divided by twelve, and that the whole numbers in the quotient thus obtained shall be the punishment of the accused at all events and absolutely; and in pursuance of such agreement, to so find a verdict and

assess the punishment of the accused is such misconduct that the verdict will be set aside. *Sawyer v. Han. & St. Joe R. R. Co.*, 37 Mo. 264; *Mitchell v. Ehle*, 10 Wend. 595; *Thompson v. Perkins*, 26 Iowa 486; *Ruble* v. *McDonald*, 7 Clark 90; *Elledge v. Todd*, 1 Humph. 43; *Peckham v. Henry*, 6 Sm. & M. 55; *Grinnell v. Phillips*, 1 Mass. 530; *Dorr v. Fenno*, 12 Pick. 521; Whar. Crim. Law, Sec. 3148; *Monroe v. State*, 5 Geor. 85; *Dunn v. Hall*, 8 Blackf. 32; *Richard v. Booth*, 4 Wis. 67; *Crabtree v. State*, 3 Sneed 302.

2. When facts are shown to the court by evidence *aliunde*, giving it cause to believe that such misconduct of the jury has given a wrong direction to its verdict, in a case involving life or liberty, then a juror, so rendering a verdict, becomes a competent witness to explain or enlarge the *aliunde* evidence of such misconduct. *Praite v. Coffman*, 33 Mo. 78; *Farrar v. State*, 2 Ohio St. 57.

3. When the State shall call for an admission of the accused given in a conversation, the accused will be entitled to put in evidence all he said during the same conversation on the subject of the prosecution. 2nd Russell on Crimes, 868.

4. It is the duty of a court in the trial of a criminal prosecution to give proper instructions defining each crime of which under the indictment the accused can be convicted, and of which there is evidence in the case; and not to do so is error. *State v. Cooper*, 45 Mo. 65; Wag. Stat. p. 1106, Sec. 30. *State v. Sloan*, 47 Mo. 604.

5. The criterion or distinctive feature between the crimes of murder in the second degree and of manslaughter is that in the former the homicidal act is characterized by malice; in the latter not. 1st Wag. Stat. p. 446, Sec. 2, id. ib. Sec. 18, p. 447; 2nd Broom & Hadley's Black. Com. 481, 476; Hale's P. C., Vol. 1, p. 424, p. 466, p. 449; 1st East. P. C. p. 218, Foster C. Law, p. 290; 5 Curby 304; *Dennison v. State*, 13 Ind. 510; *Hoss v. State*, 18 Ind. 349; *Long v. State*, 46 Ind. 582; Selfridge's case, Harr. & Thomp. Self Def., 4 *et seq.*

6. While the law will infer malice from the deliberate use of a deadly weapon upon the person of another, still when it is further shown that such use is under legal provocation given by the party upon whom it is used, such as a vigorous personal assault, then such inference of malice is overcome, and the act is imputed to the hot blood resulting from such provocation; and if death results from the use of such weapon, the crime is manslaughter and not murder. Roscoe Crim Evi., 737 *et seq.*; Wharton Homicide, 2d ed. § 398; 3 Greenleaf Evi., 122 *et seq.*; *Reg. v. Smith*, 8 Carr & P. 160; *State v. Turner*, Wright (Ohio) 20; *Stone v. Town*, ib. 75; 2 Bish. Crim. Law, §§ 797-8-9; *Roberts v. State*, 14 Mo. 138; *State v. Holme*, 54 Mo. 165; *State v. Starr*, 38 Mo. 277.

Fagg and Biggs for appellant.

J. L. Smith, Attorney General, for the State.

Defendant's statements, made after the warning by Brashear, were no longer answers to Glasscock and were therefore inadmissible.

The instructions given on the part of the State were correct. *State v. Harris*, 59 Mo. 550; *State v. Hays*, 23 Mo. 287; *State v. Underwood*, 57 Mo. 40: 1 Wag. Stat. 446, § 4.

The juror Ewing was not a competent witness to prove how the jury arrived at their verdict. *Woodward v. Leavitt*, 107 Mass. 453; 25 Cal. 398; *McFarland v. Bellows*, 49 Mo. 311; 3 Grah. and Wat. New Trials, pp. 1428 *et seq.*

Defendant does not contend that the verdict of guilty was reached by the jury through any previous agreement, but only that the term of punishment was thus fixed. The conviction was therefore good. Kelley's Crim. Law, § 395 p. 208; *Dana v. Tucker*, 4 Johns. 487. Even if there was misconduct on the part of a jury in assessing the punishment, this will not vitiate the entire verdict but only that part assessing the punishment, and the verdict will then stand as a verdict of guilty only and the provisions

of section five, page 1108, Wagner's Statutes, will govern further proceedings thereon, and the record showing that the court proceeded to sentence the defendant for a term different from that fixed by the jury as provided by that section, the judgment should stand.

HENRY, J.—At the January term, 1877, of the Audrain Circuit Court, the defendant was indicted for murder in the first degree, charged with killing Jefferson D. Lowry. At an adjourned term of said court, held in February, 1877, the defendant was tried, convicted of murder in the second degree, and his punishment assessed by the jury at imprisonment in the penitentiary for a term of eighty-three years, but the court commuted it to sixty years and sentenced him for that term. From this judgment of the Circuit Court he has appealed to this court. The grounds upon which it is urged that the judgment should be reversed are, that the court did not instruct the jury in regard to manslaughter, but confined its instructions to murder in the first and second degree and excusable homicide; that the court refused to permit Glasscock, a witness for the State, after he had testified to a part, to detail all of a conversation he had with defendant in relation to the killing of Lowry; that the jury were guilty of misconduct, in first agreeing that each should set down on a slip of paper the term for which he thought defendant should be confined in the penitentiary, and then divide the aggregate of these figures by twelve and make the quotient their verdict; that this agreement was carried out, and the result was the verdict returned into court. On a motion for a new trial the defense offered to prove this by a member of the jury, but the court refused to permit the juror to testify. The evidence tended to prove the following facts: On the day that the homicide occurred, the defendant and the deceased, with others, were at a saloon in the town of Vandalia, when defendant and one Hampton quarreled over a game of cards, each claiming the game,

and in the course of the controversy, defendant boastfully remarked that he "was the best man in Vandalia." Deceased then pulled off his overcoat and approached defendant, who said: "Why, Jeff, I did not know you were here," and soon after left the saloon, and in company with his brother and another person went to Fry's store. Deceased soon after followed, accompanied by several persons. He approached Fry's store, but the door was closed and locked. It seems that deceased remained in front of Fry's store a little while, and then went off a short distance, when the door was unlocked and defendant again went out, and deceased approached him, laid his hand on him, or took him by the collar, and said to defendant, "You drew a pistol on me." Defendant said, "No, I didn't." Lowry said, "Yes, you did." By this time defendant was against the wall of the building, deceased still having his hand on him, and as he, the second time, denied having drawn a pistol on deceased, discharged his pistol with fatal effect. Two witnesses for the State thought he did not take the pistol out but fired it from his pocket, but another witness for the State testified that he drew his pistol, that he saw the pistol and the flash, but all agree that it was not elevated above the pocket in which it was carried. The ball entered the stomach of the deceased, who lingered a few days and died. There was no evidence of any previous difficulty between the parties or of any unfriendly feeling on the part of defendant toward the deceased. They had both been drinking, and defendant after he left the dram-shop was boisterous, and spoke of Sam Harris, Lawson Henry, Myers and others, who, he said, had been imposing upon him long enough, and "he'd be d——d if he didn't intend to sell out," but in none of his conversations in that connection did he mention the name of deceased.

The court instructed the jury as to what constitutes murder in the first and second degree and excusable homi-

1. PRACTICE, CRIMINAL: Instructions.

cide, but did not give, nor did defendant's

counsel ask, any instructions in regard to manslaughter in any degree, but the counsel now contends that it was the duty of the court to instruct the jury as to manslaughter, because under the indictment and evidence they might with propriety have found defendant guilty of manslaughter in the second or fourth degree, if they found him guilty of any crime at all. We are satisfied from the evidence, that an instruction declaring what constitutes manslaughter in the fourth degree, would have been proper. In *The State v. Starr*, 38 Mo. 277, the court held that "where there is a lawful provocation, the law, out of indulgence to human frailty, will reduce the crime of killing from that of murder to manslaughter, but neither words of reproach, how grievous soever, nor indecent, provoking actions or gestures, however much calculated to excite indignation or arouse the passions, are sufficient to free the party from the guilt of murder. To have the effect to reduce the guilt of killing to the lower grade, the provocation must consist of personal violence. There must be an assault upon the person, as where the provocation was by pulling the nose, purposely jostling the slayer aside in the highway, or other direct and actual battery." See Greenleaf on Evidence, vol. 2, sec. 122. "The killing has been held to be only manslaughter, though a deadly weapon was used, where the provocation was by pulling the nose, purposely jostling the slayer aside in the highway, or other actual battery." This doctrine is too well settled for controversy, but as no instructions were asked by defendant in relation to the crime of manslaughter, was it incumbent on the court, of its own motion, to give instructions in relation to these crimes, of either of which the defendant might have been found guilty on the evidence? This court seems to have so held in several cases, and recently in the *State v. Ware*, 62 Mo. 597; *State v. Jones*, 61 Mo. 232. In most, if not all of the cases, except that of *State v. Ware*, counsel for defense had asked, and the court refused, instructions which, if unobjectionable in

their phraseology, should have been given, and it was held that the court should not, therefore, have neglected to give such as the law of the case required. In the *State v. Ware*, it does not appear that any were asked, and the court, citing the case of *State v. Mathews*, 20 Mo. 50, observes that, "aside from thes being binding authority, we think it sustained by good reason. Juries should not be allowed to guess at the law in such cases." It seems to be the settled law of this State that the court, *in criminal cases*, commits error if it fails to declare the law to the jury applicable to the case made by the evidence, whether proper instructions or any are asked by the defendant or not; and it was especially the duty of the court in the case at bar. The court of its own motion gave several instructions, defining murder in both degrees, and we think it should have defined all of the crimes to which the evidence was applicable. The court must have been prompted to give instructions, on its own motion, by a conviction that those already given were insufficient, and when, dissatisfied with those given, the court undertook to instruct the jury, it should have declared the whole law applicable to the case made by the evidence.

2. INSTRUCTIONS: murder: manslaughter: excusable homicide

On the trial the State introduced H. Glasscock, the sheriff, who testified as follows: Defendant came into my custody about five minutes after the shooting. I asked him why he had shot Lowry. He said he did not know why he had done it; and defendant continued to talk about the matter, when Esq. Brashears told him not to talk so much, or not talk about the matter. I then took defendant to Esq. Brashears's house. He continued to talk all the way down there. We ate supper together, and after an hour or so, defendant and I went to bed. *Defendant was talking about the matter all the time, from the time I asked him why he had shot Lowry, until we went to bed.* On cross-examination, he said: "This conversation between defendant and myself, he doing the most of the talking, *was continued with but little interruption from*

CRIMINAL LAW: evidence.

the time I asked him why he shot Lowry, until we went to bed. After Brashears told him not to talk, the defendant continued the conversation about the shooting as we went along the street to Brashears's house." The defence asked what else defendant said about the shooting of Lowry, but the court sustained an objection to the witness testifying to any of the conversation, except that which passed before Brashears told defendant not to talk about the matter, and in this, we think, that the court erred. Although Brashears told him not to talk about the matter, he did not cease to talk in answer to the sheriff's question, and the State had no right to call for a portion of his statement, and have that excluded which followed Brashears's warning. If he had ceased to talk when Brashears told him to do so, and thus broke off an explanation of the killing he was making to the sheriff, it was error to admit that fragment of the conversation which preceded the interruption by Brashears. If on the contrary, he did not heed the interruption, but continued the conversation, the defense was entitled to all he said in answer to the sheriff's enquiry; so that error was committed in either view of the question. Russell on Crimes, Vol. 2, 868; Greenleaf on Evi., Vol. 1, § 218.

The finding of a verdict by a jury, as here alleged, is such misconduct as will invalidate it. This has been held whenever the question has been considered by a court of last resort, with perhaps one or two exceptions; but there is almost an equal unanimity of opinion, that the jurors will not be admitted to prove such misconduct. In *Grinnell v. Phillips*, 1 Mass. 541, a contrary doctrine was held, and in *Pratte v. Coffman*, 33 Mo. 72, it was intimated that cases might arise involving life and liberty, in which the rule might be departed from, but the case in 1st Mass. has been overruled by a series of later decisions in that State; and in this State, the cases of *Sawyer v. The H. and St. Jo. R. R. Co.*, 37 Mo. 263; *State v. Coupenhaver*, 39 Mo. 39, and *State v. Underwood*, 57 Mo. 40, have terminated the controversy,

4. JURY: verdict: misconduct.

5. MISCONDUCT: witness; juror.

and it can no longer be considered an open question. Judgment reversed and cause remanded. All concur.

REVERSED.

PRATT, PLAINTIFF IN ERROR v. EATON, ET. AL.

1. **Equity:** VENDOR'S LIEN: EXCHANGE OF REALTY: AGREEMENT TO REMOVE INCUMBRANCE. Where a married woman owned a lot as her own separate estate, and agreed to exchange the same for mill property, making an agreement that she would, at the time of exchanging deeds as part of the consideration for the mill tract, remove an incumbrance of $1000 on the town property; but on exchanging deeds, she failed to remove the incumbrance; it was held that equity would charge the mill tract with the incumbrance, and compel a sale of such tract for the payment of such incumbrance, regarding it as a vendor's lien.
2. **Vendor's lien, waiver of.** This result would not be effected by reason of the fact that, subsequent to the exchange of deeds, the owner of the mill tract accepted a bond, signed by one of the grantees in the deed for the mill tract and by the husband of the owner of the town lot, and this for two reasons: *First*—Because the evidence showed that the bond was not accepted, nor intended as a waiver of the vendor's lien; *Second*—Because the bond could not be regarded as an independent security of a third person, since the husband was already bound by his statutory covenants contained in the words "grant, bargain and sell," and the bond given could do no more.

On Motion for Rehearing.

1. **Husband:** WIFE'S PROPERTY; STATUTORY COVENANTS. It was held that notwithstanding the fact that the husband was not the owner of the town lot when he joined with his wife in conveying, still in the contemplation of the statute he was a "grantor," and as much bound therefore by his statutory covenants as if owner of the land.
2. **Vendor's lien, waiver of.** That were this not so, the result arrived at in the opinion would still be the same; for, granting that the acceptance of the bond of the husband was prima facie evidence of a waiver of the lien, such acceptance was not conclusive, and the evidence was clear that no such intention was entertained.

Error to Cole Circuit Court.—Hon. Geo. W. Miller, Judge.

E. L. Edwards & Son for plaintiff in error.

1. Mrs. Clark having failed to remove the incumbrance as stipulated, equity will enforce a specific performance of the contract. 1 Sto. Eq., § 30; 2 Ib. Tit., Specific Performance.

2. Pratt has a vendor's lien on the mill property to secure the payment of the purchase money with interest. *Pratt v. Clark*, 57 Mo. 189.

3. The pretended sales by Eaton to Mrs. Clark, and by her to her son, Luther Hickok, were made long after the commencement of this suit.

4. The fact that Mrs. Clark paid more than her proportion of the purchase money, if true, will not prevent Pratt from holding a vendor's lien for the unpaid purchase money.

5. The allegation of Mrs. Clark in her answer, that she had bought Eaton's interest in the land and sold the same to her son, Luther Hickok, who in turn had sold it to one Linsenbarth, and that she had received the full amount of the purchase money before the commencement of this suit, is not supported by one particle of evidence.

6. The obligation given by John Clark and Henry Eaton to indemnify Pratt against any loss resulting from the failure to remove or pay off said incumbrance, was no waiver of the vendor's lien of Pratt on the land sold by him to Mrs. Clark and Eaton. John Clark was bound by his covenant of warranty in the deed from Mrs. Clark and John Clark to Pratt for lot 110. Eaton was one of the vendees of the land sold by Pratt to them, and Pratt had a lien on the land, against him, as a purchaser, for the unpaid balance of the purchase money. He only undertook to do in the bond, what the law would have compelled him to do had he not given the bond; that is, it would have enforced the vendor's lien, on the land for the balance of

the purchase money. *Delassus v. Poston*, 19 Mo. 425: *Skinner v. Purnell*, 52 Mo. 96; *Gill v. Clark*, 54 Mo. 416; *Sitz v. Deihl*, 55 Mo. 20; *Emmerson v Whittlesey*, ib. 259; Lead. Cas. Eq. 272.

7. A security is not a positive waiver of the lien, or its extinguishment. If a security is taken, the burden of proof lies on the vendee to show that the vendor agreed to rest on that security and to discharge the land. (2 Sto. Eq., §1226.) Even the taking an independent security, as, for instance, a mortgage on another estate or a pledge of personal security, has been held not to be conclusive evidence that the lien has been waived. Id. *Brown v. Gilman*, 4 Wheat. 290; S. C. 1 Mason 212; *Hughes v. Kearney*, 1 Sch. & Lefr. 135; *Saunders v. Leslie*, 2 B. & Beatt. R. 514.

Lay & Belch for defendant in error.

1. When Pratt sold this property to Eaton, and took from Mrs. Clark other property upon which there was an incumbrance, with an express agreement with her that she was to pay off that incumbrance, this showed his intention to rely on that promise, and thereby waive the equitable lien. This was a separate special agreement with her and not an agreement with her and Eaton.

2. He waived his lien by taking the obligation of Clark and Eaton to pay off the incumbrance when due. The matter of removing the incumbrance was a separate and distinct contract between Mrs. Clark and Pratt; nor was John Clark a party to the contract of purchase by Mrs. Clark and Eaton. By his bond of indemnity he obligates himself when there was no obligation before. No anterior verbal agreement had any binding effect on him. He was not bound by the warranty in the deed, for he gave none. The bond shows an express intention to vary the original contract. It reads: "For the further consideration of one dollar, to us in hand paid, we do obligate and bind ourselves *to pay off* and discharge said note when the same

shall become due and payable; and all interest and costs that may be due thereon, and in default of such payment by us, to save the said Pratt harmless." This is not only a waiver by operation of law, but by the express agreement of parties. 1 W. & T. L. C. 364; *Adams v. Buchanan*, 49 Mo. 64; *Delassus v. Poston*, 19 Mo. 425; *Emmerson v Whittlesey*, 55 Mo. 254; *Durette v. Briggs*, 47 Mo. 356. The fact that Clark was the husband of one of the contracting parties, and acted as the agent for his wife, does not change the law. The plaintiff seems to rely on the fact, that Clark was and continued insolvent; this does not change the law. It is accepting personal security that evidences the *intention* to waive the equitable lien. The legal effect attached the moment Pratt accepted Clark's bond and was not held in abeyance, dependent upon his future solvency or insolvency.

3. Mrs. Clark had long before the institution of this suit sold out, and conveyed all her interest, and her vendees should be made parties.

SHERWOOD, C. J.—This case was here before, (57 Mo. 189) when we took occasion to declare our views in respect to vendor's liens. When the case was remanded, the defendant, John Clark, having died, and Eaton failing to answer, Mrs. Clark answered, putting in issue the allegations of the petition and setting up certain matters of defense which will be hereafter adverted to. On the hearing, the result was adverse to the plaintiff, and he comes here by writ of error. The case before us, had its origin as will be seen by the volume referred to, in an exchange of certain real estate known as Pratt's Mill, owned by plaintiff, for in-lot No. 110, in the City of Jefferson, owned by Mrs. Clark as her separate estate. The substance of the agreement was, that Mrs. Clark was to convey the above mentioned lot in part payment for the mill tract, which was to be conveyed by Pratt to Mrs. Clark and Eaton, and Mrs. Clark was, upon the exchange of titles, to remove an incumbrance, then exist-

1. EQUITY: vendor's lien; exchange of realty: agreement to remove incumbrance.

ing on the city property for $1,000. On the exchange of deeds this contract was not complied with, and after vain efforts to have it done, plaintiff was forced himself to satisfy the incumbrance, and therefore brings this suit for specific performance of the agreement, and to have a vendor's lien declared against the mill tract property, to the extent of the incumbrance he was thus compelled to remove.

2. VENDOR'S LIEN: waiver of.

We pass as unworthy extended comment one of the defenses that Mrs. Clark had conveyed anterior to the institution of the suit, the real estate now sought to be charged to one Luther B. Hickok and he to one Linsenbarth, as there is not a particle of evidence offered in support of that allegation, nor of the one that Hickok was a purchaser without notice. So that the only question of any practical importance is whether there has been a waiver of the vendor's lien on the mill tract by Pratt in accepting the bond given to him by Clark and Eaton. This bond was conditioned that the obligors therein should pay off the incumbrance on in-lot 110, and to save Pratt harmless. We do not regard this bond in the light of a collateral or independent security, whose acceptance would be held as tantamount to a waiver of Pratt's lien on the tract which he exchanged for the city property; for the reasons that Eaton was one of the vendees, and, therefore, could not be regarded as a third person; and as to Clark, although his notorious insolvency would not perhaps affect the question, yet he was already bound by his covenants contained in the deed from himself and wife to Pratt, and expressed in the words "*grant, bargain and sell*," and his bond could do no more. But conceding that this view is not wholly free from question, still the acceptance of the bond cannot, under our decisions, be held as *conclusive* evidence of the waiver which it is claimed had occurred. (*Durette v. Briggs*, 47 Mo. 356. In *Sullivan v. Ferguson*, (40 Mo. 79) where a guaranty very similar to the bond above mentioned, was given by a *third*

person, doubt was expressed as to its sufficiency to abrogate the lien, and so the case was not put alone on that ground. If the delivery of even an independent personal security is not *conclusive*, then evidence of intention is admissible; and it would seem the duty of the vendor who desires to resist the inference to be drawn from the acceptance of such independent security, to introduce competent testimony to the effect that he did not design to relinquish his lien. (*Durette v. Briggs, supra.*) In the case at bar, the lien had already existed for months before the bond was given, showing that there was no intention at least, at the outset, to waive the lien. All the cases cited from the books, show a waiver *before* the lien had ever attached. But Pratt's intention not to accept the bond as a bar of his vendor's lien, is conspicuously shown by the prominent fact that after the bond was given, he continuously demanded of Clark who, down to the time of his death was his wife's agent, to perform the contract and remove the incumbrance, as he and his wife had agreed. And that the wife so agreed, is admitted both in her answer and in her testimony, and that Clark himself, long after the bond was given, still viewed the obligation to remove the incumbrance on the city property as subsisting, is shown by his repeated declarations to that effect. Taking all these circumstances into consideration, as well as others of a kindred nature, which the record discloses, all pointing to the facts that the lien was created on the mill tract, and that it was never waived, and that the removal of the incumbrance on the city property and the interchange of deeds were to be *concurrent acts*, we feel no hesitancy in holding that it would be against equity and good conscience to permit Mrs. Clark to hold the mill tract discharged of the lien or implied trust, which attached at once thereto by implication, when the deeds were delivered. We shall in consequence of these views reverse the judgment of the court below, and will direct that court in conformity hereto, to enter a decree in this cause, declaring that a ven-

dor's lien exists on the mill tract, equal in amount to that which Pratt was compelled to pay, together with accrued interest, for the removal of the incumbrance on the city property and that the property on which such lien is declared to exist, be sold for the enforcement thereof. Judgment reversed and cause remanded. All concur.

REVERSED.

Motion for Rehearing.

Lay & Belch for respondents moved for a rehearing, on the grounds: 1. That the court had overlooked the material fact, that lot 110 was the separate property of Mrs. Clark; 2. That the court should not have ordered the sale of the mill tract. It should, at most, have reversed the judgment. The decree, as rendered, cuts out Hickok and Linsenbarth, who are innocent purchasers, and are not parties to the suit.

The court bases its conclusions upon the fact that John Clark, having joined his wife in the sale of her separate property, he was, therefore, bound by the statutory covenant implied in the words "grant, bargain and sell." The intent of the parties to the deed should control. 10 Mo. 587; 4 Cruise Dig. Ch. 19, Sec. 1. As the statute required the husband to join in this deed, it was clearly John Clark's intention to comply with the statute and nothing more. All parties so treated the conveyance. This appears from the position of his name in the deed following hers. This shows the intention, and it is not answered by the assertion that she was not bound by the covenants. But conceding that he was bound, implied covenants are construed strictly, and no action will lie upon them unless it comes within the *letter* of the implied covenants. Rawle Cov. Tit. 486; Sugden Vendors 424; *Winston v. Vaughan*, 22 Ark. 72; *Cain v. Henderson*, 2 Binn. (Pa.) 108; 3 Pa. 322. It is conceded that the debt was Mrs. Clark's debt, contracted by her, and made a lien on her separate estate, and was not Clark's

debt. Then these covenants bind him to what? That the real estate was free from incumbrances done or suffered by the grantor—by him. There was none; and the covenant cannot be enlarged to include incumbrance done or suffered by his wife. Wag. Stat. 274, § 8. But what better position does it place plaintiff in, if it be held that Clark did bind himself? Then we contend that plaintiff waived his vendor's lien at the time he accepted these covenants; for John Clark was a stranger to the contract of purchase of the mill tract.

Another and underlying error in this decision is that the court treated this as an exchange of property. It was not so; it was purely a transaction of bargain and sale. The recitals in the deeds show this, and preclude all inference of exchange. Sharswood, J., in *Drain v. Shelly*, 57 Pa. St. 426, says exchanges have fallen into disuse in modern conveyancing. To make an assurance of this character, it is indispensable that the word *escambium* should be used * * * * so indispensably necessary that it cannot be supplied by any other word or described by any circumlocution. There being no exchange, this action can not be maintained on the principle that plaintiff retained his lien.

There is nothing to show that Clark was authorized to act or speak for his wife after the consummation of the respective sales; and his declarations after that time should not be considered. This is the general rule, and it applies with especial force when it is attempted to hold the wife responsible for her husband's declarations.

It may be that if Pratt had failed to execute a deed to the mill property, under the circumstances of this case equity would deny relief to Mrs. Clark. The principle is well settled that on many unconscionable contracts equity will deny relief, when in the same character of cases, after the contract has been consummated, it will refuse to annul it or relieve the wronged party. Mrs. Clark may have been guilty of wrong, but this court can afford Pratt no

relief. He must take the fruits of his contract, just as millions have stood upon their miscalculations, folly, or over-confidence.

Per Curiam.—We are thoroughly conversant with the facts of this case. We did *not* overlook the material fact that Mrs. Clark possessed a separate estate in the in-lot 110 in the city of Jefferson. And it is difficult to see how counsel could *read* the opinion and fail to observe what is *expressly stated therein.* It was at the *option* of Mr. Clark, whether he joined in the covenant contained in the words "grant," "bargain" and "sell." Having made such a covenant, he is as much bound thereby, *as if the owner in fee.* If this were not so, the result would be simply this: that in every case where the separate property of the wife in lands is sold, the statutory covenants in such deed would be, as covenants, wholly worthless. Worthless, as to the *wife*, because the statute (§ 2, p. 273) explicitly provides that "no covenant, express or implied in such deed, shall bind the wife or her heirs except so far as may be necessary effectually to convey from her and her heirs all her right, title and interest expressed to be conveyed therein." Worthless as to the *husband*, because he (as counsel assume) is not, under the provisions of the statute, (§ 8, p. 274) a "*grantor.*" In other words, that you may obtain as many implied covenants from a husband as you please, *but when you get them*, they are, in all instances where they occur in conveyances made by husband and wife, of the separate estate of the latter, of not the *slightest value! The bare statement of such a proposition, is its own ample refutation.* But even were this point ruled in the manner claimed by counsel, it would neither gainsay nor affect the conclusion reached. For, as the opinion shows, the taking of independent security is not *conclusive* evidence of the waiver of the vendor's lien; that in consequence of this, it was competent to show the intent of the parties to the transaction. This

1. HUSBAND; WIFE'S PROPERTY: statutory covenants.

2. VENDOR'S LIEN: waiver of.

evidence was furnished by the declarations of Clark, who continued down to the time of his death to be his wife's agent; declarations made whenever Pratt called on him to have the agreement performed for the removal of the incumbrance; declarations wholly inconsistent with the idea that the bond was received as a manifestation of a waiver of the lien. In relation to the effect of the "suggestion" of the property having been conveyed to purchasers without notice, we certainly shall pay no attention to matters respecting which, not the least evidence was furnished in the lower court. If, indeed, there are other parties interested, purchasers without notice, their rights are not in the smallest degree damnified by the decree ordered to be entered. The motion for re-hearing is therefore overruled.

OVERRULED.

WHEELER v. MABREY, APPELLANT.

Contract: BURDEN OF PROOF.—Where cattle were sold at an agreed price, and were subsequently delivered to and received by the purchaser. *Held*, That he must pay for them at that price, unless a different contract was afterwards entered into; and the burden of proof of such substituted contract is on the purchaser.

Appeal from Jackson Circuit Court.—Hon. SAM'L L. SAWYER, Judge.

Karnes & Ess for appellant.

Tichenor & Warner for respondent.

NORTON, J.—This suit is founded upon a contract for the sale of a herd of cattle at an agreed price of twenty-two $\frac{50}{100}$ dollars per head, on which plaintiff claims there is due him from defendant seven dollars and fifty cents per

head, on one hundred and fifty cattle. Defendant admits in his answer that in September and December, 1871, plaintiff sold and delivered him a herd of cattle, and that he accepted the same, but denies that the contract price for each and every head was twenty-two $\frac{50}{100}$ dollars. He says that all the cattle were purchased the 26th September, 1871, in the State of Kansas at $22 $\frac{50}{100}$ per head, and were to be delivered by plaintiff to defendant in Dakota Territory, and that plaintiff was to move them at once and deliver them in a reasonable time to defendant in said territory; that all of said cattle were delivered in due time except one hundred and fifty head, which were not presented for delivery till December, 1871; that he refused to receive them at the contract price, and so notified plaintiff; that he agreed to receive them at fifteen dollars per head, and plaintiff, under this agreement, delivered them to defendant; that in February, 1872, he had a settlement with plaintiff, and paid him for the cattle. The allegations of the answer were denied in plaintiff's replication. The cause was tried before a jury, which rendered a verdict for plaintiff for $1125, upon which judgment was rendered, and from which defendant appeals.

It is urged, as a reason for the reversal of the judgment, that the court committed error in giving the following instructions on behalf of plaintiff: 1. The jury are instructed that it is admitted by defendant in his anwer, that plaintiff did, in September and December, 1871, sell and deliver a herd of cattle to defendant, and defendant further admits, that the cattle were purchased at the contract price of $22.50 per head; 2. The jury are instructed that, inasmuch as the cattle were purchased by defendant at the sum and price of $22.50 per head, and were delivered to and received by defendant, the defendant will be compelled to pay said sum per head, unless you believe that after said contract of purchase was entered into, defendant and plaintiff entered into a different contract whereby plaintiff agreed to take a less sum, and it devolves

upon defendant to show this; 3. The jury are instructed that, although the cattle in controversy were not delivered in a reasonable time, yet, as defendant received the same, he will be bound for the contract price, unless you believe, from the evidence, that a different contract was entered into, whereby plaintiff agreed to take a less sum; and before you can find that there was such a different contract, you must find, from the evidence, that plaintiff knew of the same and agreed to take a less price for said cattle.

Defendant's instructions: 1. The jury are instructed that, it is admitted by the pleadings that the cattle purchased of plaintiff by defendant were to be delivered in Dakota in a reasonable time after such purchase, and the jury are instructed that in determining whether or not such cattle were so delivered within a reasonable time, they may take into consideration all the circumstances connected therewith, together with all the evidence in the cause; 2. If the jury believe, from the evidence, that the 150 head of cattle mentioned in the petition were not offered to be delivered to defendant in Dakota within a reasonable time after the sale, then defendant had a right to refuse the same on the contract; and if, thereupon, he did refuse to so receive these cattle on the contract, and informed plaintiff that he would receive the same at fifteen dollars per head, and no more; and if, thereafter, plaintiff directed said cattle to be delivered to defendant, then the plaintiff cannot recover, unless you shall believe, from the evidence, that said cattle were delivered and received under the first contract; 3. If the jury believe, from the evidence, that the 150 head of cattle, mentioned in the petition, were offered to be delivered by plaintiff subsequent to the delivery of the balance of the cattle embraced in the contract, and that defendant refused to receive the same on the contract, but offered to receive said 150 head at $15 per head; and if the jury believe, from the evidence, that plaintiff or his agent had notice from defendant or

his agent, of such refusal, and afterwards delivered said cattle to defendant, then they will find for the defendant, unless they believe, from all the evidence, that said 150 head of cattle were delivered and received under said first contract.

The Court's instruction: And if you find that defendant refused to receive said cattle at the original contract price, but proposed to receive said cattle at $15 per head, and plaintiff, with knowledge of such refusal of defendant to so accept said cattle at the original contract price, and of the proposition to receive them at $15 per head directed delivery of said cattle to defendant, then the presumption is that they were delivered and received at said proposition at $15 per head, and that plaintiff agreed to the same.

It was shown by the evidence on the trial, that defendant, in September, 1871, purchased a herd of one thousand cattle at Abilene, Kansas, of plaintiff, for which he was to pay $22 $\frac{50}{100}$ per head, upon their delivery to him in a reasonable time in Dakota Territory; that plaintiff started the cattle about the middle of September, 1871, in charge of prudent men, and that they reached the Missouri river at a point opposite Dakota Territory in the latter part of October; that 786 of them were crossed over and received by defendant; that one hundred and fifty-nine were unmanageable and could not be crossed in consequence thereof; that plaintiff, under the contract, was to deliver the cattle in Dakota Territory in a reasonable time after the sale, and defendant was to superintend their crossing the Missouri river; that Millet, a partner of Mabrey, superintended the crossing, and left the 159 head in charge of one Dougherty, directing that a chute of slabs should be made to cross them; that one Cohren informed plaintiff in November that the cattle had been abandoned by Dougherty, and he thereupon employed Cohren to go up and cross the cattle and deliver them to defendant. That nine of them froze to death, and the other one hundred and

fifty were turned into Mabrey & Millet's herd by Cohren, about the 10th December, he having crossed them over the river on the ice. Previous to their being crossed, Cohren sent three telegrams to Wheeler, two dated Nov. 11th, '71, stating: "Cattle are here. Millet will not take them." "The cattle are all right. Capt. Millet will not receive them. Can't cross river"; also one dated Nov. 21st, 1871: "I will cross cattle soon as possible." A letter from Millet, dated Kansas City, Dec. 5th, '71, to plaintiff, informed him that they had succeeded in swimming over the river 786 head of cattle—"the balance I left Dougherty to keep * * * I and Mabrey will be down the 1st December again, and am in hopes they have crossed the cattle in last month, as they were building a floating chute out of slabs, as I told them to do, when your men would start back;" also a letter from Mabrey, dated Nov. 18th, at Fort Sully, in which nothing is said in regard to the cattle in dispute. Cohren, a witness on the part of defendant, testified that plaintiff employed him to take charge of the 150 head of cattle which had not been crossed over the river; that he crossed them over on the ice between the 10th and 16th of December, and turned them into Mabrey & Millet's herd; that before delivering them, he had a conversation with Millet, who said he would not receive them as contract cattle, that they had been abused, and had not been turned over at same time as the balance of the herd, and told witness to notify Wheeler that he would take them only at $15 per head. Witness also stated that he notified Wheeler either by telegraph or letter that Millett refused to take the cattle, and was instructed by Wheeler to hold the cattle till the river froze, and to cross them and turn them into Mabrey's herd; that after the cattle were delivered, he verbally notified Wheeler that Millet had refused to receive them only at $15 per head, to which he replied that he would hold them responsible.

It appears, both from the evidence and pleadings, that there was no question between plaintiff and defendant as

to the mere delivery and receipt of the cattle. This seems to be conceded in the answer and established by the evidence. The question of difference was as to the terms on which they were delivered and accepted: the plaintiff claiming that they were delivered under the contract made with defendant, whereby he agreed to pay twenty-two $\frac{50}{100}$ dollars per head, and the defendant claiming that he refused to receive them under that contract, and made a new contract with plaintiff whereby he was only to pay $15 per head, and that under this contract they were delivered and received. This disputed question was one of fact, properly referable to the jury, to be determined by them upon the evidence, and unless the court misdirected them as to the law, or so directed them as to lead their minds away from the issue involved, no cause exists for disturbing the judgment pronounced on their finding. It is urged that the court erred in the first instruction, in telling the jury that the answer of defendant admitted that plaintiff did sell and deliver a herd of cattle to defendant, and that the contract price was $22 $\frac{50}{100}$ per head. While the first paragraph in the answer admits the purchase and denies that the contract price was twenty-two $\frac{50}{100}$ dollars per head, the second clause contains a clear admission that the cattle were purchased at that price, and admits the delivery of them, but claims that 150 of them were delivered under a new contract, he having refused to receive them under the original contract; so that we think what was said by the court in reference to the reception of the cattle, in the first, second and third instructions, was warranted by the statements in the answer. While the instructions may be open to some verbal criticism, taking them all together, as modified by the instruction given by the court of its own motion, we think the law of the case was given fairly and in such manner as not to lead the mind of the jury from the true issue: the substance of all of them being that, if the jury believed that defendant received the cattle under

the contract in which he agreed to pay $22 $\frac{50}{100}$ per head, they would find for plaintiff, and if they believed that defendant refused to receive the cattle under that contract, and received them under a contract assented to by plaintiff or his agent, in which he was only to pay $15 per head, they would find for defendant. Judgment affirmed, in which all the other Judges concur except Judge Sherwood, absent.

AFFIRMED.

BERRY v. ST. LOUIS, SALEM & LITTLE ROCK R. R. CO., APPELLANT.

1. **Railroad Fence Law Construed**: FAILURE OF COMPANY TO MAINTAIN LAWFUL FENCE ADJOINING ENCLOSED FIELD EXCUSED, WHEN.—A railroad company which, under an agreement with the owner of an enclosed and cultivated field, omits to maintain a lawful fence along its road, where it passes through such field, as required by the statute (*Wag. Stat.* 310 § 43) is liable for the killing of a stranger's cattle getting into such field and thence upon the road, unless the field is itself enclosed by a lawful fence.
2. **Policy of the Statute**: The duty of fencing the sides of its road, where it passes through enclosed and cultivated fields, is imposed by the statute upon the railroad company for the benefit of adjoining proprietors, and not for the benefit of strangers.

Appeal from Crawford Circuit Court.—HON. V. B. HILL, Judge.

N. G. Clark for appellant.

The defendant should have been permitted to prove that the ox killed was trespassing in the field of Conger at the time he was driven or ran upon the track of defendant's road. See 1st Redfield on Railways, Sec. 3, page 486. *Ells v. Pacific R. R. Co.*, 55 Mo., and authorities cited.

Lay & Belch for appellant.

The statutory requirement that the company shall fence where the track passes through, along or adjoining enclosed or cultivated fields, was manifestly for the benefit of the adjoining land owners, whose stock, without fences and cattle guards, might escape from their fields and come upon the railroad track. Hence the section also provides that the company shall maintain "farm-crossings of the road for the use of the proprietors or owners of the land adjoining such railroad." This "farm-crossing" then, on Conger's farm, was for his use by the terms of the law itself. It is contended on the other side, however, that it was for the use also of the plaintiff, in order that his steer while trespassing on the crops of his neighbors on one side of the road might have a safe and convenient crossing of the railroad to prey upon other crops on the other side. There can be neither law nor reason in such a proposition. See 1 Redf. Rwys, 519, *et. seq.*

HENRY, J.—This was a suit before a justice of the peace to recover damages for the killing of a steer by a train of defendant's cars, in August, 1874. There was a judgment against defendant in the justice's court from which it appealed to the circuit court, where, on a trial anew, plaintiff again had judgment, from which defendant has appealed to this court.

The facts, as disclosed by the evidence, were that plaintiff's steer got into the field of one Conger, through which the road of defendant passed, and that, in attempting to drive it from the field, it went on to defendant's track through a gap in the railroad fence left open by Conger for his accommodation in passing from one side of his field to the other, with consent of defendant. There was no evidence showing how the steer got into Conger's field. Conger testified, that outside his field, a few yards from his fence, the railroad fence was often down, and, when up, was not

a lawful fence; but nothing is stated by him, or any other witness, to show any connection between that condition of the fence and the steer's getting into the field, and if, as in the absence of evidence we shall assume, the cattle guards where the road left his field were in proper condition, the height or strength of the railroad fence outside of the field is wholly immaterial. The court, at the instance of plaintiff, gave the following instructions: 1. If defendant, where its road ran through enclosed or cultivated lands, left a gap in its fence, unprotected with cattle guards, such neglect was sufficient to entitle plaintiff to recover, although such failure might have been upon an agreement with the owner of the land; 2. If the steer was killed by the engine and cars of defendant, and such steer got on the road of defendant at a point where there was not a sufficient fence along such road, the jury will find for plaintiff in the sum they think the steer worth, at the time of the killing.

Defendant asked the following, which was refused: If they believe, from the evidence, that plaintiff's ox was trespassing in the field of O. B. Conger, and that defendant's road was fenced on the sides of the road where it passed through said field, and plaintiff's ox got on the track through an open gate, left down by said Conger at a private crossing in said field, and remained on the track until killed, defendant is not liable, and the jury should find for defendant.

This record presents an important question which has not been directly passed upon in this State. Sec. 43, page 310, Wags. Stats. provides, that "every railroad corporation formed or to be formed in this State, &c., shall erect and maintain good and substantial fences on the sides of the road where the same passes through, along, or adjoining enclosed or cultivated fields, or unenclosed prairie lands, of the height of at least five feet, with openings and gates, or bars therein and farm-crossings of the road, for the use

1. RAILROAD FENCE LAW CONSTRUED: failure of company to maintain lawful fence adjoining enclosed field excused, when.

of the owners or proprietors of the land adjoining such railroads, and also shall construct and maintain cattle guards at all railroad crossings where fences are required as aforesaid, suitable and sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad." The duty of fencing the sides of their roads through enclosed and cultivated fields is imposed upon railroad companies for the benefit of the owner or proprietor of such fields and enclosures. This was the construction placed upon the New York statute of which ours is substantially a copy in the case of *Brooks v. N. Y. & Erie R. R. Co.*, 13 Barb. 593. After quoting the first clause of the section, which is substantially the same as the first clause of our 43rd section, the court says: "Now the Legislature were making provision in the first clause of the above section for the benefit of the adjoining proprietors only, and not for strangers, who had not the legal right to use those adjoining lands and farm-crossings." In Vermont a similar statute has received the same construction. *Jackson v. Rutland & Bur. R. R. Co.*, 25 Vermont; 27 Vermont 49. Also in New Hampshire and Massachusetts. 47 N. H. 391; 35 N. H. 163; 39 N. H. 53; 98 Mass. 560. In *Brooks v. N. Y. & E. R. R. Co.*, above cited the court held that "the cattle of a stranger which are on the premises of the adjoining proprietor, without right, are not within the protection of this clause of the statute." If by an arrangement between the company and the owner of an inclosed or cultivated field the company are relieved of the duty of building the fences, they omit to do so at their peril if the field be not enclosed with a lawful fence, and cattle get into the field, and from the field go upon the road and are killed by a passing train. If the field is sufficiently enclosed, that is all the protection that strangers are entitled to, and, as to *their stock*, additional fences along the sides of the road are not necessary, nor are they required by the statute, for as to them the sides of the road are already

2. POLICY OF THE STATUTE:

fenced by the fences enclosing the field. The gaps of the fences on the sides of the road having been left open by Conger, with the consent of defendant, the case is the same with regard to defendant's liability as if no fences had been erected there at all. Defendant, on the trial, offered to prove by Conger the character of the fencing around his field, but the court refused to admit the testimony. In our view of the case, that was a pertinent inquiry. The instructions given by the court are in conflict with what we regard as the law of the case, and the judgment is, therefore, reversed and the cause remanded. The other Judges concur.

REVERSED.

HICKS v. ELLIS ET AL. APPELLANTS.

1. **Summons, Sufficiency of**: Under a statute which requires that the writ of summons shall command the officer to summon the defendant "to appear in court on the return day of the writ, and at a place to be specified in such writ, to answer the petition of the plaintiff," (*R. S.* 1855, 1,222 § 6) a writ is substantially sufficient which commands the sheriff to summon the defendant "to be and appear before the judge of the H. county circuit court, at F. in H. county, on the first Monday of June next, and answer the petition of N. C., plaintiff, and have you then and there this writ.

2. **Evidence**: PRESUMPTION OF CORRECTNESS OF OFFICIAL ACTION.—Nothing appearing to the contrary, it will be presumed that an order for a writ of *venditioni exponas* in a civil case, which appears by the record to have been made at a special term of court, was made at a special term, regularly held for the transaction of the general business of the court, and not at one appointed for the sole purpose of trying persons confined under criminal process, and at which no civil business can be lawfully transacted.

3. **Venditioni Exponas**: NATURE OF THE WRIT.—The writ of *venditioni exponas* is a writ of Execution; under it the lien and levy of the original writ, which it is issued to enforce, will continue.

4. **Judicial Sale**: EXECUTION — VENDITIONI EXPONAS — EFFECT OF ACT OF MARCH 23, 1863, CONCERNING EXECUTIONS ON LEVY OF ORIGINAL WRIT.—Before the passage of the act of March 23, 1863, (*Sess. Acts*, 1863, p. 20) a writ of *venditioni exponas* had issued from the

circuit court of one county to the sheriff of another county to enforce a levy on real estate previously made under an execution, which had expired without a sale being made, because there had been no term of the circuit court of the latter county at which it could be made. The *venditioni exponas* was returnable to the December term, 1863, but for the same reason no sale was made till March, 1865. *Held*, That under the 3rd section of that act the original levy remained in force, and the sale then made was valid. That section applies to any execution issued from a court of record in one county to the sheriff of another, under which real property might be sold, whether the levy was made under such execution or under some other writ, which it supplemented or succeeded.

5. **Alias Fi. Fa. no Abandonment of Previous Levy, When:** A party, by suing out an *alias fi. fa.* directed to the sheriff of one county, does not abandon a levy already made under a writ issued to the sheriff of another county.

Appeal from Jackson Circuit Court.

F. M. Black & A. Comingo for appellants.

1. *Venditioni exponas* was the proper writ to preserve the lien created by the levy of the *fi. fa.* *Porter v. Mariner*, 50 Mo. 364; *Lackey v. Lubke*, 36 Mo. 115; Herm. on Ex. 26, 331.

2. It is not necessary that the *venditioni exponas* be issued at the return term of the *fi. fa.* *Smith v. Spencer*, 3 Ired. 256; *Taylor v. Doe*, 13 How. 287.

3. The *vendi.* was kept alive until a term of the Jackson Circuit Court was held by the act of March 23, 1863, and especially the 3rd section. The term "execution," as used in the act, is broader than and includes writs of *venditioni exponas*. 1 Bouvier Law Dict. 495; 2 Ib. 621; Wag. Stat. 601, § 1. It is also claimed that this act keeps alive only such writs as had been levied, and does not affect this one, because it had not been levied. The very nature of the writ precludes the necessity of a levy, and this writ comes within the object of the statute. *Wood v. Messerly*, 46 Mo. 255; *Stewart v. Severance*, 43 Mo. 322; *McDonald v. Gronefeld*, 45 Mo. 28; moreover the "*fi. fa.*" was first levied, property advertised for sale, and the *vendi.* issued to

complete the sale, and was a part of the original levy, and the *fi. fa.* and *vendi.* are to be taken together, and come within the literal language of the statute. Herm. on Ex. 331.

4. While the sheriff's deed of March 15, 1865, calls the writ under which the sale was made an "alias execution,"—yet it recites the judgment, execution, levy, failure to make sale, and the reasons therefor, the order and the substance thereof and the issue of writ thereunder—and is sufficient. The Jackson Circuit Court was suspended by operation of law. Acts 1860 and 1861, p. 510; Acts 1863, pp. 154, 161; Acts 1863-4, pp. 296, 297.

5. The issuance of execution to sheriff of Howard county in August, 1862, was no abandonment of the levy in Jackson county. Rev. Stat. 1855, p. 737, §8.

6. There is nothing in the record offered by the plaintiff to show how the special term was called, nor to show that it was not an adjourned term. It does not purport to give any of these proceedings. The presumption is that it was rightfully held.

Russell Hicks respondent p. p.

1. The Howard Circuit Court had no jurisdiction of the original process offered in evidence, nor of the person of defendant Maughs. The judgment does not recite that he was served with process, and the summons shown in the transcript is defective. The statute (R. S. 1855, p. 1222, § 6), prescribes the requisites of this writ: 1st, that defendant be summoned to appear *in Court*; 2nd, that it be on the return day of the writ; 3rd, at a place to be specified in such writ. None of these things were done in this supposed summons. *Bush v. Doy*, 1 Kansas 86; *Bobb v. Graham*, 4 Mo. 223; *Wragg v. The Bank*, 8 Porter (Ala.) 196. The defendants in that suit had a right to insist on the notice required by the statute; that not having been given was a fatal defect, and rendered the sale void. *Coffin v. Field*, 7 Cush. 359; *Clark v. Lewis*, 35 Ills. 422; *Cook v.*

Gibbs, 3 Mass. 195; *Gould v. Barnard*, 3 Mass. 199; *Streeter v. Frank*, 4 Chand. (Wis.) 94; *Shrewsbury v. Mt. Holley*, 2 Vt. 220; *Hollingsworth v. Barbour*, 4 Pet. 474.

2. The Howard Circuit Court, at the special term in January, 1863, had no jurisdiction to make the order for the *vendi.*, and the writ issued thereunder was void. Rev. Stat. 1855, p. 540, §§ 47 to 53; *Dulle v. Deimler*, 28 Mo. 583; *Williams v. Cable*, 7 Conn. 123; *White v. Riggs*, 27 Me. 114. The recital of a special term in the transcript must be taken as true, unless contradicted by some other part thereof. *Hahn v. Kelley*, 34 Cal. 392. This was not done. The power conferred by the *venditioni exponas* was special and limited in point of time to the return day thereof, and the sale made long after the return day thereof was void. *Rogers v. Cawood*, 1 Swan 142; *Overton v. Perkins*, 10 Yerger 331; *Barden v. McKinnie*, 4 Hawks 282; *Lackey v. Lubke*, 36 Mo. 122; *Lessee of Glancy v. Jones*, 4 Yeates 214.

3. The provisions of the special act of 1863 have no bearing on the original execution issued to Jackson county, and the original levy made thereunder, or the *vendi.* under which the sale was made. The first section does not apply to it, because it was issued before the passage of the act; nor does the second section, because the writ was not levied, and could not have been levied on the land; nor did it nor could it continue any lien on the land. The lien was created by virtue of the levy under the original execution, and continued under that execution until abandoned or discharged. That lien was in nowise affected by the *vendi.* It was neither extended nor shortened. Nor does the third section apply. The *vendi.* was not and could not be levied, and as no levy was made, none could remain by force of the *vendi.*; and as the act made no provision where a sale under a *vendi.* should be had, the time of sale thereunder remained as theretofore fixed by the statute and common law, and neither gave the sheriff any authority to sell after the return day of the *vendi.* The office of

a *vendi.* is to secure to a judgment creditor the benefit of a levy and a lien thereby created, when from some cause other than his own fault or negligence a sale could not be made before the return day of the original writ. *Cox v. Joiner*, 4 Bibb 95; *Irwin v. Buckle*, 3 Bibb 344-5; *Bellingall v. Duncan*, 3 Gillman 447. This *vendi.* was a simple command to sell the land already levied upon. Its authority ceased on and after the return day thereof.

4. The issuing to the sheriff of Howard county an alias execution, after the levy of original, and before the *vendi.* issued, was an abandonment of the first levy, and the sale made under the *vendi.*, on the levy thus abandoned, communicated to the purchasers no title. *Alley v. Carroll*, 3 Sneed 110; *Eckhols v. Graham*, 1 Call. 492; *Amyett v. Backhouse*, 3 Murphy 67

Hough, J.—This was an action of ejectment. Both parties claimed title through G. M. B. Maughs; the plaintiff by direct conveyances from said Maughs, executed in 1868 and 1873, and defendant by a sale under execution against said Maughs, made in 1865. Whether the sale under execution was a valid one, and passed the title of said Maughs to the property in controversy, is the question presented for our determination. In April, 1860, suit was instituted in the Circuit Court of Howard county by *Nancy Carrole v. James H. Reed, J. D. Smith* and *G. M. B. Maughs*, on two promissory notes executed by them. Service was had on Smith in Howard county. The following writ directed to the sheriff of Jackson county, accompanied with a copy of the petition, was served according to law:

State of Missouri, } Sct.
County of Howard. }

State of Missouri to the Sheriff of Jackson County, greeting:

We command you to summon James H. Reed and G. M. B. Maughs to be and appear before the Judge of the Howard County Circuit Court at Fayette, in Howard county, on the

first Monday of June next, and answer the foregoing petition of Nancy Carrole, plaintiff, and have you then and there this writ. Witness Charles H. Stewart, clerk of the said court, under the seal thereof, at office in Fayette, on the 24th day of April, 1860.

[L. S.] C. H. STEWART, Clerk.

On the 10th day of December, 1860, final judgment by default was rendered against all the defendants. Execution was issued on this judgment on the 31st day of January, 1861, directed to the sheriff of Jackson county, returnable on the first Monday of December following, which was levied upon the land in controversy, and duly returned with said levy indorsed, no court having been held in Jackson county prior to the return day of said writ, at which said land could be sold. On the 1st day of August, 1862, execution was issued to the sheriff of Howard county, which was returned unsatisfied. On the 19th day of January, 1863, in pursuance of an order made by the Howard Circuit Court on the 3rd day of said month, reciting the levy and failure to sell under the execution issued in 1861, a writ of *venditioni exponas*, returnable to the second succeeding term, was issued to the sheriff of Jackson county, by virtue of which said sheriff advertised and sold the property in controversy on the 15th day of March, 1865, no term of the circuit court having been held in said county of Jackson prior to that time. At said sale the defendant Mastel and one Ellenberger became the purchasers, and received a deed from the sheriff. In 1867 Ellenberger conveyed his interest to Mastel, under whom the other defendants claim possession. The regular time for holding the circuit court in Howard county during the years in which the foregoing proceedings occurred was on the first Mondays of June and December. The term at which the writ *venditioni exponas* was ordered is thus designated in the entry of record: "Howard Circuit Court, special term, January 3rd, 1863. At a special term of the Howard Circuit Court, begun and held at the court-

house in the City of Fayette, Howard county, Missouri, on the 3rd day of January, 1863, were present Hon. George H. Burkhart, Judge of said court, &c.," then follows the order of *vendi.* A duly certified transcript of all the foregoing proceedings in the circuit court of Howard county and a certified copy of the sheriff's deed were offered in evidence, but were excluded by the court on the following objections made by the plaintiff:

1st. Judgment against Maughs and others was and is absolutely void, said court having no jurisdiction over the person of said defendant, as appears by the record offered in evidence.

2nd. The Howard Circuit Court had no jurisdiction to order a *venditioni exponas* at the special term held in January, 1863; said order and writ were nullities, and gave the sheriff no power to sell.

3rd. Even if said *vendi.* was regularly issued, the sheriff could not sell the land described therein after the return day of the writ.

4th. The issuance of the execution to the sheriff of Howard county in August, 1862, was an abandonment of the levy made in Jackson county in 1861.

5th. The deed fails to recite the names of the parties to the execution, and shows no legal authority to sell the land.

6th. The deed does not recite any execution in form or substance, known to the statutes of Missouri, concerning executions, or known to the common law, and is therefore void.

The deed offered in evidence did not, *in totidem verbis*, state the names of the parties to the execution under which the levy was made, but they were clearly ascertainable from other recitals in the deed, and we are inclined to think that the deed of itself was admissible, though it is not necessary to determine this point, as another deed from the sheriff, perfect in all respects, dated the 20th day of March, 1873, was offered by the defendant, to which the same objections heretofore stated were made, and none

other, and the same was excluded by the court. As this conveyance was subsequent to the date of the deeds from Maughs to the plaintiff, and no objection was made on that account, and as it cannot be pretended that the objections numbered five and six were applicable to it, it is quite evident that the court, in excluding the first deed and transcript, considered some one or all of the first four objections made by the plaintiff as fatal to the defendant's case.

1 SUMMONS: sufficiency of.

As to the first objection, the case of *Payne v. Collier*, 6 Mo. 321, is, we think, sufficiently in point to be decisive of it. In that case the writ required the defendant to appear before the judge of the circuit court at the next term, to be holden at St. Louis on a certain day, and the writ was held to be sufficient. The statute prescribing what a writ of summons shall continue was the same then as now. The writ now under consideration is in our judgment equally specific. It commanded the officer to summon the defendants to appear before the judge of the Howard County Circuit Court, at Fayette, in Howard county, on the first Monday in June next, (which day was therein fixed as the return day of the writ,) and answer the petition of the plaintiff. This court will take judicial notice that the first Monday in June was the day fixed by law for holding the circuit court in that county, and the defendant was bound to take notice of that fact. A requirement to appear at that time, which was the return day of the writ, and answer the petition of the plaintiff, was tantamount to a requirement to appear in court on that day, and was a substantial though not a literal compliance with the statute. As was remarked by Judge McGirk, in the case cited, "there was no possible chance for the defendant to be deceived or misled about the matter."

2 EVIDENCE: presumption of correctness of official action.

The second objection based upon the provisions of Secs. 48 to 53 inclusive of the Rev. Stat. 1855, in relation to "Courts—Judicial power," wherein it is provided that *special adjourned* sessions may be held in continuation of the regular term upon

its being so ordered by the court or judge in term time, and entered by the clerk in the minutes of the court. It is further provided in one of said sections that *special* terms of the circuit court may be held for the trial of any person confined in jail two months before the regular term, but that the ordinary jurisdiction of the court can only be exercised at such special terms by the consent of the parties. The plaintiff seems to have overlooked the 45th section of the same statute, which is as follows: "If at any time after the commencement of a term it happen that the court shall not be held according to its adjournment, it shall stand adjourned from day to day until the evening of the third day; or, if the judge of any court cannot attend any regular term, he may notify the sheriff of the county in which such court should have been held, previous to the first day of such term; and it shall be the duty of such sheriff, by proclamation, at the court-house door, to adjourn such court to the next regular term, or to such *special or adjourned* term, as the judge shall direct." This section, in our opinion, furnishes ample warrant for designating as "special" terms other than those called for the trial of persons who have been confined in the jail for two months; and as in such cases *omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium*, it devolved upon the plaintiff to show that the special term at which the order for the *venditioni exponas* was made was a special term appointed for the sole purpose of trying persons confined under criminal process.

The third objection involves the construction of the act of Assembly of March 23, 1863, in relation to executions.

3. VENDITIONI EXPONAS: nature of the writ.

The *venditioni exponas* was issued in January, 1863, was made returnable to the December term 1863, but was not executed until March, 1865, and, unless such writs are within the purview of said act in relation to executions, it must be conceded that at the time the sale was made the force of the writ was spent and the sheriff had no authority to sell. *Bank v. Bray*, 37 Mo.

That act is as follows: "Sec. 1. That all executions heretofore issued and not satisfied, either in whole or in part, and all liens which accrued in virtue thereof, are hereby revived and declared to be in full force, and that said liens shall exist and continue according to the priority of said executions, until the same are satisfied; and that in all cases where said executions have been returned not satisfied, either in whole or in part, it shall be the duty of the clerks to issue new executions referring to the former ones, and in case levies have been made to recite such levies in said renewal executions, and authorize and command the officer to whom such renewal executions are directed, to levy such renewal executions upon additional property, if the former levy shall be deemed insufficient to satisfy such executions; but in case of sale of property under such executions, to first exhaust the original levy before selling any property embraced in such subsequent levy. Sec. 2. That executions now issued, or that hereafter may be issued from any court of record and levied upon real estate, if from any cause the real estate shall not be sold at the next term of court, from which said execution has issued or may hereafter be issued, said execution and lien of said levy shall remain and continue in full force until a term of court is held in the county when said property may or can be sold. Sec. 3. That executions now issued or that may hereafter be issued from a court of record in one county and sent to the sheriff of any other county in this State, shall be levied on real estate and from any cause the circuit court of said last mentioned county shall not be held before the return day of said execution, said sheriff shall retain said execution, and the levy made by virtue thereof shall remain in full force until there shall be a term of the circuit court in said last mentioned county at which said real estate may be sold." The general purpose of this act is plain, though its phraseology is exceedingly awkward and inexplicit. It has several times been the subject of judicial interpretation, but in no case precisely like the present.

A writ of *venditioni exponas* is undoubtedly a writ of execution. Bouvier Law Dict. tit. Execution-*venditioni exponas*. It was so denominated in *Kane v. McCown*, 55 Mo. 196; and in *Wood v. Augustine*, 61 Mo. 46. In *Webb v. Armstrong*, 5 Humph. 379, it was held that a writ of *venditioni exponas* was an execution within the meaning of the statutes authorizing motions against sheriffs for failure to return executions. It is an execution or writ to satisfy the judgment on behalf of the plaintiff. It is sometimes spoken of as a branch of the writ of *fieri facias*, and it may contain a *fieri facias* clause. Freeman on Ex., Sec. 57. The effect of a sale under it is the same as though the sale had been made under the original writ before return day. The lien and levy of the original writ continue under the *venditioni exponas*. Freeman on Ex., Sec. 60. The *venditioni exponas* when issued relates to, and, as it were, identifies and incorporates itself with the previous execution and levy. *Taylor v. Mumford*, 3 Humph. 67.

4 JUDICIAL SALE. EXECUTION: venditioni exponas; effect of act of March 23, 1853, concerning executions on levy of original writ.

It is especially urged, as a reason why this act does not apply to the writ in question, that the first section, in so far as it is applicable to writs of *venditioni exponas*, relates only to such writs issued after the passage of the act, and in pursuance of the provisions thereof, and that the second and third sections relate only to writs which require a levy to be made. It is too plain for argument, we think, that when the third section speaks of executions "that may hereafter be issued," it contemplates and includes the "renewal executions" provided for in the first section, that is, writs of *venditioni exponas* with a *fieri facias* clause, as well as the ordinary writs of *fieri facias*. This act certainly intends to keep alive until they could be satisfied the executions which it required the clerks to issue, and yet, under the construction contended for by the plaintiff, such executions would not come within the terms of the third section. For, by the terms of the act, no levy is to be made under such writs, unless the former levy

should be deemed insufficient to satisfy the execution, and they would not therefore be continued in force until a sale could be made, in the event it should be unnecessary to make an additional levy thereunder. Such a construction would manifestly defeat the obvious purposes of the act. Now it is evident to us that the words "executions now issued," in the third section, are intended to cover and include every species of execution which said section contemplates, "may hereafter be issued," and these words would, therefore, include executions under which no levy need be made, for such executions, with or without a *fieri facias* clause, might have issued before the passage of the act. That is to say, if the section covers executions issued after the passage of the act under which no levy can be made, it will equally cover executions issued before the passage of the act under which no levy can be made, whether they contain a *fi. fa.* clause or not, for as to both classes, those issued before and those issued after the passage of the act, the words "shall be levied on real estate," are applied by the statute. We are of opinion, therefore, that any execution issued from a court of record in one county to the sheriff of another county, under which real property might be sold, whether the levy was made under such execution or under some other writ which it supplemented or succeeded, comes within the provisions of the third section. Any other construction would be entirely too narrow and too technical, and would, in many instances, wholly thwart the highly beneficent purposes of the act. This court has at all times been disposed to put a liberal interpretation upon the provisions of this act, and to make the grammatical construction thereof yield to the obvious intent of the Legislature. *Wood v. Messerly et al.*, 46 Mo. 255. It would seem to us strange indeed, if it were true, that while the Legislature had provided that all executions issued before the passage of the act, and not satisfied either in whole or in part, and all liens which had accrued thereunder, should continue in full force until satisfied,

and that an execution *venditioni exponas* issued the day after the passage of the act, based on executions previously levied and returned not satisfied, should also continue in force until satisfied; that a *venditioni exponas* issued the day before the act passed, on an execution levied and returned not satisfied, should not be continued. We are of opinion that the writ in question was continued in force by the act of March 23, 1863, and that the sale made thereunder was valid.

Authorities have been cited from other states to sustain the fourth point, but we do not conceive them to be altogether applicable to the case at bar. In *Yarborough v. State Bank* 2 Dev. 23, it was held that a levy made and returned is waived by taking out an *alias fi. fa.*: and that a *venditioni exponas* with an *alias fi. fa.* clause, is the proper writ to keep up the lien created by the levy, when an additional levy is desired. But it was competent under our statute for the judgment creditor to have several executions issued to different counties at the same time, and the *alias* execution, which it is claimed in this case operated as an abandonment of the levy, was issued to the sheriff of Howard county, and not to the sheriff of Jackson county, where the levy was made. No *venditioni exponas* could have issued to the sheriff of Howard county on the levy made in Jackson, and no *alias fi. fa.* was issued to Jackson county. The judgment will therefore be reversed and the case remanded. The other judges concur.

5. ALIAS FI. FA. no abandonment of previous levy, when:

REVERSED.

DAVIS, PLAINTIFF IN ERROR, v. PEVELER ET AL.

1. **Ejectment:** GENERAL ISSUE: EVIDENCE. The defendant in ejectment may, under the general issue, show title in himself by proof that he purchased the property at sheriff's sale under a judgment and execution against the plaintiff.

2. **Sheriff's Deed:** SCHOOL MORTGAGE: COUNTY COURT: PRESUMPTION: DESTRUCTION OF RECORDS. A sheriff's deed purporting on its face to have been executed by virtue of an order of some court, which assumed the right to order the sale of land mortgaged to secure the payment of school money, will be presumed to have been executed under an order of the county court, though that court is not expressly named, where it appears by parol evidence that, before the date of the deed, the owner of the land described in it had borrowed school money from the county court, and had given a mortgage upon real estate to secure its payment, under which mortgage a sale had been made by the sheriff by order of that court, and that afterwards the sheriff had died, and all the records of the county had been destroyed.

3. **Evidence:** PRACTICE. The improper admission of evidence, which was afterwards withdrawn from consideration by an instruction, furnishes no ground for reversal of a case not tried before a jury.

4. **New Trial:** NEWLY DISCOVERED EVIDENCE. A motion for a new trial, on the ground of newly discovered evidence, should disclose its character, name the witnesses, and show that it is important.

Error to Montgomery Circuit Court—HON. GILCHRIST PORTER, Judge.

Nathan C. Kouns for plaintiff in error.

I. The defendant ought not to have been allowed to prove that he had bought plaintiff's title at sheriff's sale. That defense ought to have been specially pleaded. *Northrup v. Miss. Valley Ins. Co.*, 47 Mo. 443; *Kiskaddon v. Jones*, [last term, not reported,] 2nd Wag. Stat. 1015, 812. *Russell v. Whitely*, 59 Mo. 196; *Funkhouser v. Mallen*, 62 Mo. 555; *Brown v. Brown*, 45 Mo. 412; *Myers v. Gale*, 45 Mo. 416, and *Carter v. Scaggs*, 38 Mo. 302 were decided under the Statute 2nd Wagner 1015 §12, but on the facts of each special case.

II. The sheriff's deed fails to show what court, or that any court, made the order on which it was executed. It certainly cannot be settled law in Missouri that a sheriff's deed, which utterly fails to show by what authority it is made, passes the title to a man's real estate, or that it will be presumed that a certain court in a certain county made an order, simply from the fact that no other court could lawfully do it, in the absence of any recital in the deed that the only court that might lawfully have done it did do it.

Stuart Carkener for defendant in error.

NORTON, J.—This was an act of ejectment, in the Montgomery County Circuit Court, for the recovery of the possession of one hundred and forty-four $\frac{63}{100}$ acres of land in said county. The petition is in usual form, and the answer contains a general denial. On the trial defendants obtained judgment, and plaintiff brings the case here by writ of error. There was no dispute as to plaintiff having once had the legal title to the land sued for; but defendants claimed that they had purchased his title at a sale made by the sheriff of Montgomery county, under an order made by the county court of said county, directing it to be sold under a mortgage executed by plaintiff to secure the payment of school money, which had been loaned to plaintiff.

The defendants introduced evidence on the trial showing that all the records of Montgomery county had been burned in October, 1864, and also introduced as a witness Farrow, who testified that he had been presiding justice of the county court of that county from the year 1857 to 1863, and that plaintiff had borrowed money belonging to different school townships in the year 1857 or 1858; that in 1860 or 1861 the plaintiff was cited to appear and give additional security for the money so borrowed; that he appeared, and complied by giving a mortgage on real estate, and that in 1862 the land so mortgaged was sold

under an order of said court by the sheriff of the county. The deputy clerk of the county court testified that he attended to most of the business of the county clerk in the years 1861 and 1862, and for several years prior and subsequent thereto, and that he well recollected that plaintiff had borrowed school money, and his impression was that he gave a mortgage to the county to secure its payment. The treasurer of the county testified and produced entries from his treasurer's book, showing the payment of interest by plaintiff on bonds given for school moneys for the years 1859, 1860, 1861 and 1862; such payments indicating that one of the bonds was in excess of one hundred dollars. The defendants also offered in evidence a deed from the sheriff of Montgomery county dated October 30, 1862, conveying all of plaintiff's interest in the land sued for to defendants. All the above evidence was objected to on the ground that the defense sought to be established by it had not been specially pleaded, and the deed was objected to on the further ground that it did not show, on its face, any legal authority to sell.

There is nothing in the first ground relied upon, it being settled that defendant in ejectment, may, under the general issue, show title in himself by proof that he purchased the property at a sheriff's sale under a judgment and execution against the plaintiff, 45 Mo. 416; 38 Mo. 302.

1. EJECTMENT: general issue; evidence.

The objection to the deed offered in evidence is disposed of by the case of *Warner v. Sharp*, 53 Mo. 599. In that case the objection to the deed was that it did not recite what court made the order directing a sale, nor the date of the order. The deed in the case at bar is more specific in this, that it gives the exact date of the order. The recitals contained in the deed show that the sale in question was made by virtue of an order, and that the order was made by some court assuming to have the right to make an order for the sale of land mortgaged to secure the

2. SHERIFF'S DEED: school mortgage; county court; presumption: destruction of records.

payment of school money. This is evidenced by the statement, "and it is further ordered that the said sheriff make due return to this court of his proceedings, etc." If, at the time this order was made, there was no court in Montgomery county having jurisdiction to make such an order, the deed would be void. But, if there was a court having such jurisdiction, we think that the order might be referred to that court, and considered as having been made by it, especially when, as in this case, the fact is shown that the records of Montgomery county had been destroyed by fire, and the presiding justice of the county court testified to the fact that such an order had been made. The Revised Statutes of 1855, pp. 1423-6, which govern this case, provide that the county court shall loan out township school moneys, and for all sums in excess of one hundred dollars the court is required to take a bond with two or more sufficient securities, and also a mortgage upon unincumbered real estate situated in the county, with power to sell; that whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff reciting the debt and interest to be recovered, and commanding him to levy the same, with costs of the mortgaged premises, which shall be described as in the mortgage, and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a *fieri facias* on a judgment of foreclosure in the circuit court, and shall be proceeded on accordingly. The conclusion, therefore, follows, from the recitals in the deed, that no other court but the county court could have made the order, and if so made, it invested the sheriff with power to sell, and a purchaser at such sale will be protected in his purchase, especially when the sheriff making the sale is dead, as was shown in this case, and the records of the court containing the order were destroyed by fire, and the fact of the order having been made is verified by the evidence of the presiding justice of the court in which

it was made. We think the objection to the admission of the deed as evidence was properly overruled. This view of the case dispenses with the necessity for considering the objections made to the instructions given, as well as to the action of the court in refusing those asked.

The citation which was read in evidence, although not properly admitted as evidence, having been excluded from consideration by instruction, does not constitute sufficient cause for reversal, as the case was tried by the court without the intervention of a jury, and because, even if admitted as evidence, it could have had no bearing on the case in the view we take of it. Nor is their sufficient ground to disturb the judgment of the court on the weight of evidence as to the execution of the mortgage. There was evidence on both sides, and in such case it has been again and again held that this court would not interfere.

3. EVIDENCE: practice.

Nor is there anything in the reason alleged in the motion for a new trial—that since the trial plaintiff had discovered new evidence, a portion of which was written—that justifies interference with the action of the trial court. The character of the evidence is not disclosed, the nature of it is not stated, no witness is named, nor is the evidence stated to be important, but simply alleged to be "new and more communicative in its character." The discretion of the court was not unsoundly exercised in overruling the motion on that ground. Judgment affirmed with the concurrence of the other Judges.

4. NEW TRIAL: newly discovered evidence.

AFFIRMED.

BENNETT v. MCCANSE, APPELLANT.

Amendment of Pleadings at the Trial: Where to avoid a plea of the statute of limitations, plaintiff averred part payment by the defendant within the statutory period, and upon the trial it appeared that the payment was not made by defendant, but was in fact made by a co-maker of the note, it was no error for the court to permit the pleading to be amended so as to conform to the fact. And the alleged variance between the pleading and the evidence was not material, and therefore, might have been disregarded and the facts found according to the evidence, because the payment before the statutory bar attached by any one authorized to make payment, took the case out of the statute, and the only substantial issue raised by the pleading, was whether, under the circumstances, the statute was a bar.

Appeal from Dade Circuit Court.—HON. JOHN D. PARKINSON, Judge.

N. Gibbs for appellant cited *Kraft v. Hurtz*, 11 Mo. 109; *Webb v. Tweedie*, 30 Ib. 488; *Clark v. Smith*, 39 Ib. 498; *Hausberger v. P. R. R. Co.*, 43 Ib. 196; *Beattie v. Weakley*, 60 Ib. 72; *Gist v. Loring*, 60 Ib. 487.

C. W. Trasher and *H. C. Young* for respondent cited *Moak's Vansantvoord's* Pl. 832, 847; *Rail Road Co. v. Lindsay*, 4 Wall. 650; *Turner v. Moore*, 51 Mo. 501; *Nash v. Towne*, 5 Wall. 689; *Zeigler v. Wells*, 28 Cal. 263; *Union India Rubber Co. v. Tomlinson*, 1 Smith's Com. Pl. R. 383; *Birch v. Benton*, 26 Mo. 153; *Hoyt v. Reed*, 16 Mo. 294; *Henshaw v. Liberty Ins. Co.*, 9 Mo. 333; *Beardslee v. Steinmesch*, 38 Mo. 168; *Beach v. Curle*, 15 Mo. 105; *Erfort v. Consalus*, 47 Mo. 208; *Reeves v. Larkin*, 19 Mo. 192; *Bell v. Scott*, 3 Mo. 212; *Dowd v. Winters*, 20 Mo. 361; *Clements v. Maloney*, 55 Mo. 360; *Wells v. Sharp*, 57 Mo. 56; *Ely v. Porter*, 58 Mo. 158; *McClurg v. Howard*, 45 Mo. 365; *Block v. Dorman*, 51 Mo. 31; *Whitaker v. Rice*, 9 Minn. 13; *Smith v. Anthony*, 5 Mo. 504; *Ashley v. Glasgow*, 7 Mo. 320; *Hill v. St. Louis*, 20 Mo. 584; *Brewer v. Dinwiddie*, 25 Mo. 351; *Harbor v. Pacific R. R. Co.*, 32 Mo. 423; *Downing v. Still, Adm'r.*, 43 Mo. 309.

SHERWOOD, C. J.—Action on promissory note brought August 12, 1872, note dated August 1, 1860, and due in one day. The petition stated that a payment of $152.55 on the note had been made by defendant, October 3rd, 1860, and that on August 1st, 1870, he had made another payment thereon of $18.10. The answer of defendant denied the payment by him of the latter sum, and pleaded the statute of limitations in bar of the action. At the trial the evidence showed that the payment denied was in fact made by Whaley, a co-maker of the note. Thereupon the court permitted the petition to be amended in accordance with the facts proven, and judgment went for plaintiff.

There was no error in granting permission for the amendment. Such amendments are fully authorized by the statute (sections 1, 2, 3, 2nd W. S., pp. 1033–4), as well as sanctioned by repeated decisions of this court, (*Turner v. C. & D. M. City R. R. Co.*, 51 Mo. 501; *Fisher v. Max*, 49 Mo. 404; *Harkness v. Julian*, 53 Mo. 238; *Wells v. Sharp*, 57 Mo. 56.) Nor did the amendment change the issues between the parties. The only substantial issue between the parties was, as to whether the statutory bar had attached or not; nor was there any change in the cause of action; that consisted alone in the debt evidenced by the note in suit.

If the defendant regarded himself as misled by the supposed variance between the pleading and the proof, he should have pursued the statutory method, by filing his affidavit to that effect, and then the court, if satisfied, would not have granted permission to amend, except upon terms. But we do not regard the variance as material, and the court might, therefore, under section 2, *supra*, have disregarded the variance as immaterial, and directed the facts to be found according to the evidence. The payment by Whaley, the co-maker, of the $18.10, before the statutory bar had attached, took the case out of the statute, not only as to himself, but also as to the defendant, (*Craig v. Callaway County Court*, 12 Mo. 94; *Lawrence County v.*

Dunkle, 35 Mo. 395,) and the plea of the statute put in issue not only payment by the defendant, but payment by any person authorized to make it. (2 W. S. 921, sec. 30.) For these reasons we shall confirm the judgment. All concur.

AFFIRMED.

COURTNEY ET AL. v. BOSWELL ET AL., PLAINTIFFS IN ERROR.

1. **Warranty of Quality:** PAYMENT OF, PURCHASE MONEY AFTER DISCOVERY OF DEFECTS, EFFECT OF, AS BAR TO ACTION ON WARRANTY. Payment of part of the purchase money after discovery of defects in a machine sold with warranty, is no bar to an action on the warranty, where, before the payment, the purchaser offered to return the machine, but was induced to retain it for further trial by the promise of the seller either to remedy the defect or, failing in that, to rebate a part of the price, and the payment was made while the seller was endeavoring to provide the remedy.
2. **Warranty:** MEASURE OF DAMAGES. In an action for breach of warranty that a machine is fit for use, the measure of damages is the difference between the price paid and its real worth, with interest at six per cent

R. O. Boggess for plaintiffs in error.

I. Plaintiffs paid the money after the notes were due without compulsion, and upon full knowledge of the alleged breach of waranty, when the consideration for their promise had wholly failed. This was a voluntary payment. Can a party recover back money paid under such circumstances? *Volenti non fit injuria. Claflin v. McDonough*, 33 Mo. 412; *State v. Powell*, 44 Mo. 436; *Christie's Adm'r v. St. Louis*, 20 Mo. 143; *Walker v. St. Louis*, 15 Mo. 563; *Draper v. Owsley*, 15 Mo. 613; *Trow v. Vt. Cent. R. R. Co.*, 24 Vt. 487; 1 U. S. Digest 286, Sec. 439; *Brisbane v. Dacres*, 5 Taunt. 143.

II. After discovering that the machine was worthless, plaintiffs agreed to keep it in consideration that defendants agreed to and did furnish new parts and a man to operate it. Afterwards they accepted a rebate of $25 out

of the price to compensate them for defects, and in consideration thereof agreed to and did pay the balance as full adjustment of the whole controversy. By so doing they surrendered whatever right they may originally have had to recover on the alleged breach of warranty. *Munford v. Wilson*, 15 Mo. 540; *Cutler v. Smith*, 43 Vt. 577; *Dodge v. Minn., &c. Roofing Co.*, 14 Minn. 49; *Onderdonk v. Gray*, 19 N. J. Eq. 65; *Allen v. Hooper*, 1 Freeman's Chy. 276; *Dougherty v. Stamps*, 43 Mo. 243; *Bedford v. Moore*, 54 Mo. 448.

III. When the rebate of $25 was allowed, and balance due for the machine was paid, a new agreement was then and thereby made and executed. This was a good accord and satisfaction, so that plaintiffs could not thereafter recover on the alleged breach of warranty. *Munford v. Wilson*, 15 Mo. 540; *Goff v. Mulholland*, 28 Mo. 397; *Jenkins v. Hopkins*, 9 Pick. 542; *Coffin v. Jones*, 11 Pick. 45; *Tuttle v. Tuttle*, 12 Met. 551. The court should have so instructed the jury. *Merchants' Bk. v. State Bk.*, 10 Wall. 637; *Callahan v. Warne*, 40 Mo. 131; *Boland v. Mo. R. R. Co.*, 36 Mo. 491.

Robert Adams, Jr., for defendant in error.

The petition sets forth a cause of action for a breach of warranty. *Carter v. Black*, 46 Mo. 384; *Kenny v. James*, 50 Mo. 316; and the instructions given placed the issues plainly before the jury.

Norton, J.—This is an action to recover damages for an alleged breach of warranty, instituted in the court of common pleas for Cass county. The petition alleges that, in 1869, plaintiffs purchased of defendants one Hubbard Continental Reaping and Mowing Machine, at and for the price of $200; that, at the time of the purchase, defendants represented that said machine was fit and proper for the purpose of reaping grain and hay, and was a good machine in all its parts, and that plaintiffs, relying on said repre-

sentations, purchased and paid for the same; that the said machine was wholly worthless, and that they had sustained damages in the sum of $200 from the 1st of June, 1870. Defendants, in their answer, deny that they made such representations as are charged in the petition, or that said machine was worthless and of no value, and set up, as a further defense, that all matters of difference and alleged damages growing out of the sale of said machine had been fully settled and adjusted between plaintiffs and defendants. This latter defense was denied by replication.

On the trial plaintiffs were introduced as witnesses, and their evidence tended to prove that the machine was purchased by them about May or June, 1869, at the price of two hundred dollars, for which they gave two notes, one due in three and the other in five months; that at the time of the sale defendants warranted the machine to be perfect in all its parts, capable of doing good work as a reaper; that said machine was imperfect in the gear shifter, and would not do good work as a reaper or mower, and that it was worthless, and that they had paid the price at which it was bought; that they discovered defects in the machine in a day or two after they bought it, and complained to defendants, who furnished another gear shifter, and said with it the machine would not still work; that they brought it back to defendants, who refused to take it back, but induced plaintiffs to take it back and try it again, promising that they would make it work; that defendants furnished another gear shifter and sent men down to operate the machine, but it would not work; that defendants then represented that the manufacturer had gotten up new and better gear shifters and they would furnish one of them, and requested plaintiffs to try that and keep the machine till it was furnished; that they never furnished such new and better gear shifter; that the first note was paid, and also the second, except $25, after plaintiffs knew of the defectiveness of the machine; that the remain-

1. WARRANTY OF QUALITY: payment of purchase money after the discovery of defects; effect of as bar to action on warranty.

ing $25 was never to be paid unless the improved gear shifter was furnished, and if furnished it was to be paid; that said improved shifter never was furnished, and defendants failing to make said machine work it was abandoned. Two other witnesses were introduced whose evidence tended to show that the machine was worthless. Defendants offered no evidence, but demurred to that offered by plaintiffs, and asked judgment, which was by the court overruled, and to which they excepted at the time.

At the instance of plaintiffs the court instructed the jury, in substance, that if they believed, from the evidence, that plaintiffs purchased of defendants the machine in question, for the price of two hundred dollars, and at the time of the purchase warranted the same to be perfect, and fit and proper for the purpose of reaping and mowing grain and hay, and that said machine was in fact at the time of the warranty not a good machine, and was unfit for the purpose of reaping and mowing grain and hay, they would find for plaintiffs, unless they further believed from the evidence that the plaintiffs accounted and settled together concerning the damages plaintiffs suffered by reason of the breach of warranty, and received twenty-five dollars, or rebated said sum upon the note of plaintiffs in lieu of such damages; that the measure of damages is the difference between the price paid for the machine and its real worth, with interest at six per cent.

2. WARRANTY; measure of damages.

The following instructions were asked by defendants: 1. Even if the jury believe all the evidence adduced by the plaintiffs, still they are instructed that, as a matter of law on the facts proved by plaintiffs, they are not entitled to recover, and the jury should find for the defendants; 2. If the jury believe, from the evidence, that after the plaintiffs discovered the alleged defects in said machine, they tendered and offered to deliver the same to defendants, and defendants refused to accept the same, and the said plaintiffs thereafter paid to defendants or their

agents the purchase price of said machine, except twenty-five dollars, the plaintiffs cannot recover, and the jury should find for defendants; 3. If the jury believe, from the evidence, that at the time of the sale and delivery of the machine mentioned in the petition, by defendants to plaintiffs, the plaintiffs executed and delivered to defendants their promissory notes for the purchase price of the machine, one due at three and the other at five months, and that plaintiffs used said machine and discovered the defects therein, as alleged in the petition, before the maturity of said notes, or either of them, that said plaintiffs paid said first note mentioned in full, and that after the maturity of the other note the defendants, in consideration of the alleged defects in said machine and the imperfections thereof, rebated twenty-five dollars or any other sum part of the purchase price of said machine as compensation for such defects, and plaintiffs accepted the same as compensation for such defects, and paid the balance due on said note, then the jury shoul find for defendants. Instruction No. 3 was given, and those numbered one and two were refused. The jury returned a verdict for plaintiffs, and assessed the damages at $247, upon which judgment was entered, and defendants, after an ineffectual motion for a new trial, bring the case here by writ of error.

The only question in the case is whether the matters in issue were properly referred to the jury in the first instruction given for plaintiffs and the third instruction given for defendants. The contract of warranty relied upon by plaintiffs and the breach, having been denied by the answer, put those matters in issue, and the defense set up in the answer that, in consideration of the alleged defects in the machine, defendants agreed to and did rebate the sum of twenty-five dollars from the price of the machine, which was accepted by plaintiffs as an adjustment and settlement of all matters of difference and damage growing out of the sale of the machine, having been de-

nied by replication, put that defense in issue. We think these questions were fairly put to the jury in the instructions that were given. They were told in the first instruction that if the machine was warranted, and there was a breach of the warranty, plaintiffs were entitled to recover, as damages, the difference between the price paid and the real value of the machine, unless they believed that the damages growing out of the alleged breach of warranty had been adjusted and settled between plaintiffs and defendants, in which event they were directed in the third instruction for defendants to return a verdict for defendants. We do not think that the case at bar comes within the principle of the cases to which we have been cited, relating to suits instituted to recover back money voluntarily paid. Where money is paid without fraud or duress, with full knowledge of all the facts in the case, it cannot be recovered back. No such case as this was attempted to be made in the pleadings in the case at bar, nor do we think that such a case was developed in the evidence. It is true that the evidence shows that the defects in the machine were discovered a few days after its purchase and before the payments were made; but it also shows that it was taken and tendered to defendants, who requested plaintiffs to try it further, and give them an opportunity to make good their warranty by furnishing other gearing. During the time thus requested to be given by defendants to enable them to make the machine such as they had represented it to be, the notes given for the price, except $25, were paid. It was doubtless the desire of plaintiffs to retain and pay for such a machine as they believed they were buying, and it seems to have been the purpose of defendants to make the reaper and mower all they had represented it; and to hold that plaintiffs could not maintain an action for a breach of warranty after the failure of defendants to comply with it, and recover what had been paid, while efforts were being made by defendants, and at their request, to make the machine answer the purpose for

which it was bought, would be to extend the doctrine that voluntary payments of money could not be recovered back beyond its true scope. From the whole record, we think the judgment was for the right party, and it will, therefore, be affirmed.

AFFIRMED.

ELISE AND NICHOLAS HAERLE v. KREIHN, APPELLANT.

1. **Husband and Wife:** WITNESS. A husband is not a competent witness in a suit to which his wife is a party, unless he has a substantial interest in the controversy, or acted as her agent in the transaction which is the foundation of the suit.
2. **Case Adjudged:** In a suit by a married woman and her husband to redeem land from a mortgage, it appeared that, the husband having bought the land and being unable to finish paying for it, defendant had completed the payments for him, and had received a conveyance from him and his vendor, to be held as security for the money advanced, and had gone into possession of the premises; that subsequently the husband's interest in the land, having been sold under execution, had been acquired by his wife, and that the land was worth much more than the amount remaining due to defendant on account of his advances; *Held*, that the husband, though joined with his wife as a party plaintiff, in obedience to the statute, had no substantial interest in the controversy, and is not a competent witness.

Appeal from Lafayette County Circuit Court.—HON. WM. T. WOOD, Judge.

Geo. S. Rathbun for appellant cited *Tingley v. Cowgill*, 48 Mo. 291; *Fugate v. Pierce*, 49 Mo. 441; *Moore v. Moore*, 51 Mo. 118.

Wallace & Chiles for respondent.

Harmony in the domestic relation of marriage does not require that the husband be prevented from testifying in

favor of his wife. See also *Buck v. Ashbrook*, 51 Mo. 539; *Chesley v. Chesley*, 54 Mo. 347; *Freeman v. Freeman*, 9 Mo. 763; *Hamilton v. Bishop*, 8 Yerg. 33; *Eeers v. Life Association*, 59 Mo. 429; *State v. Newberry*, 43 Mo. 429.

HENRY, J.—This was a suit in the circuit court of Lafayette county, in which plaintiffs sought to redeem lot No. 97, and twenty feet off of the west half of lot No. 92, in the old town of Lexington. They state in their petition that on the 23rd day of September, 1867, they were, and still are, husband and wife, and that said Nicholas on that day purchased of Burton A. James and wife the above described premises, at the price of $1,800, of which he then paid $500, and for the balance executed his notes, one for $600, and the other for $700, payable respectively in one and two years thereafter; that he paid off the first note, and when the second became due, James urging payment, and said Nicholas being unable to raise the money otherwise, applied to defendant, who lent him the money on condition that Nicholas and James and wife would execute to him a deed for the premises; that this agreement was made, and the bond for a title executed to Nicholas by said James and wife was delivered to defendant, and on the 2nd day of October, 1869, said Nicholas and James and wife executed and delivered to defendant a deed for said lots, as security for the money to be advanced by defendant; that on the same day, in pursuance of this arrangement, defendant paid to said James $800 in full of the principal and interest of said $700 note, and Nicholas then executed his note to said defendant for that amount, payable with ten per cent. interest twelve months thereafter; that said premises were conveyed to said defendant as security for the payment of the note, and it was so understood and agreed between the parties; that afterwards, on several executions issued on judgments against said Nicholas, his equity of redemption in the premises was sold, and at the sale,

Henry Wallace and Stephen G. Wentworth purchased it, and before the commencement of this suit sold and conveyed their interest to Elise Haerle, for her sole and separate use; that defendant has been in possession of said premises since February, 1873, renting it out, and has received several hundred dollars for rent; that said Nicholas has paid defendant on said note divers sums of money prior to 25th October, 1870, amounting in the aggregate to $600, and that at the commencement of this suit there remained unpaid of said note but about $150; that defendant is claiming the property as his own, denying that the plaintiffs have any right, etc., and ask that defendant be compelled to account, etc., and that Elise be allowed to redeem.

Defendant, in his answer, denies that he took the conveyance as a security for said money so advanced by him, and alleges that he purchased the property "under an agreement with said Nicholas that defendant should purchase, and that Nicholas should have the privilege of repurchasing the property by paying said debt (which he alleged was $900, instead of $800), and the interest and any accruing and subsequent indebtedness arising upon the part of said Nicholas, and due and owing from him to defendant on account of said property for taxes, insurance, etc.," and denies that it was taken only as a security for said money; denies that Nicholas executed to him a note for the money paid by defendant to said James; denies the payments alleged in said petition as having been made on said note; admits that he has received $370 for rent of said property, and denies that he has received any more, and claims for taxes and insurance paid by him, and repairs made on said property, several hundred dollars; states his willingness to convey the premises to plaintiff on repayment to him of said debt, interest, taxes, etc., aggregating, as he claims, $1,600. The court found for plaintiff, and from its decree the defendant has appealed to this court.

On the trial, Nicholas Haerle was introduced as a wit-

ness, and defendant objected to his testifying, claiming that he was incompetent, because the husband of his co-plaintiff and only a nominal party to the suit. This witness, against objection of defendant, was permitted to testify that the money with which he made the cash payment, and the payment on the first note to James, was the money of his wife, and furnished by her for that purpose, the purchase having been made for her in the first instance. These are the principal alleged errors, and to them we shall confine our observations, because, having examined the evidence, we are not prepared to say that the court erred in the finding, if the evidence was properly admitted.

1. HUSBAND AND WIFE: witness.

In a suit by husband and wife, if either is but a nominal party, only the other can testify, unless the nominal party were the agent of the other in the transaction. The first section of the act in relation to witnesses does not permit every party to the record to be a witness. At common law no one interested in the event of the suit could be a witness. The first section of chapter 146 Wag. Stat. 1372, removes that disqualification. By the common law no party to a suit could be a witness, but by this section of our statute the mere fact that one is a party to the record does not disqualify, if the person be otherwise qualified. In addition to the disqualification just alluded to, husband and wife were not permitted to testify for or against each other; first, because their interest was one, and, second, on grounds of public policy, to prevent the harmony of the relation from being interrupted; and that disqualification still exists, unless the statute has removed it also. Sec. 5, page 173 Wag. Stat., specifies the cases in which the wife may testify, whether joined with her husband or not, but makes no exceptions in regard to the husband, and if but a nominal party to a suit prosecuted for her benefit he was not a competent witness, but by the act of 1875 the husband is permitted to testify when he was the agent of the wife in the transaction which is the foundation of the suit. In *Owen v.*

Brockschmidt, 54 Mo. 288, where husband and wife were plaintiffs, the competency of the wife as a witness was placed upon the ground that she was the real party in interest. *Paul v. Leavith*, 53 Mo. 595. In *Harriman v. Stone*, 59 Mo. 95, on the question of the competency of the wife as a witness, *Owen v. Brockschmidt* was followed, and the same reason given for holding her competent. In *Cooper v. Ord*, 60 Mo. 420, the husband was allowed to testify expressly because he was not a mere nominal party, but had a substantial interest.

What interest has Nicholas Haerle in this controversy? His equity of redemption had been sold on execution, and 2. CASE ADJUDGED. if any other person than his wife had purchased he would not have been a necessary party to a suit by the purchaser against the defendant to redeem, and he is only a party to the present suit because his wife is not permitted to sue alone. The purchaser bought the equity of redemption and must pay whatever is due defendant on the transaction in order to redeem the premises, and will have no recourse on Nicholas Haerle for the amount he may have to pay for that purpose. On the other hand the plaintiffs in their petition state, and the evidence clearly establishes, that the property is ample security for the debt. They also allege that but $150 was owing to the defendant when this suit was instituted, and they state and the court finds that the monthly value of the rents is $15. The court below found, however, that the amount due defendant on the settlement was $691.82, and the property, according to the evidence preserved, is worth $1,600 or $1,800. In no view that can be taken of the case has Nicholas Haerle any substantial interest in the controversy. The purchaser of the equity of redemption is here seeking to redeem, anxious to pay what Nicholas owes to defendant, and the legal or equitable interest of Nicholas Haerle is absolutely nothing. If the conveyance to defendant was a mortgage, the purchaser of the equity of redemption must pay off the mortgage debt; if it was not a mortgage,

but a conditional sale, as alleged by defendant, it is already paid off.

Nor was he a competent witness on the ground of agency. The petition alleges that he purchased the property from James, and nowhere alleges or intimates that in that transaction he was the agent of his wife, nor does the petition disclose that the wife had any interest, until after the sale of the equity of redemption on execution.

The evidence to prove that the lots were purchased of James for Elise Haerle, and that it was her money with which the cash payment and the payment of the first note to James were made, was inadmissible, and the court erred in receiving it. No such issue was made by the pleading, and the issues made by the pleadings and no other should be tried. This, however, is not such an error as would justify a reversal of the judgment, because the right of Mrs. Haerle to the equity of redemption was clearly established by the conveyance from Wallace and Wentworth, and it made no difference whether her money was used in the purchase from James or not.

For the error committed in admitting Nicholas Haerle as a witness for plaintiff the judgment is reversed and the the cause remanded. All concur, except NORTON, J., not sitting.

REVERSED.

SCHRICKER ET AL. v. RIDINGS, APPELLANT

Corporation: INDIVIDUAL LIABILITY OF STOCKHOLDER: CONSTITUTIONAL LAW. The constitution provides that "dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him or her." *Held*, That under this provision a stockholder is not liable for a debt of the corporation, if he has paid the whole amount of the stock subscribed or owned by him.

Appeal from Johnson Circuit Court.

F. M. Cockrell and Elliott & Jetmore for appellant.

The plaintiffs claim that by a literal interpretation of the phraseology, "but in no case shall any stockholder be individually liable in any amount over or above the amount of the stock owned by him," an individual liability is imposed on defendant, without reference to his having paid up his stock, of an amount equal to the amount of his stock; that this amendment abolished the double liability *only as to any unpaid balance on the stock.* Such an interpretation is more ingenious than sensible. The single liability of a stockholder embraces the amount of his stock; that is, its full payment, (R. S. 1855, p. 403, Sec. 39; *Perry v. Turner*, 55 Mo. 418,) while the double liability includes the single liability with an additional amount equal to the amount of his stock. The former exists without legislation under the common law; while the latter is a creature of statute. The object of all interpretation and construction is to ascertain the intention of the law makers, even so far as to control the literal signification of the words; *verba intentione debent inservire.* (1 Black. Comm. 59; 2 Kent Comm. 55; 1 Bouvier Inst. n 4419 *et seq.*; 2 Story Const. 1; 2 Pars. Contr. 3; Story Contr., Secs. 397–456; 1 Bishop Crim. Law, Secs, 51, 59.) The double liability is a penalty, and requires strict construction. (*Kritzer v. Woodson*, 19 Mo. 327.)

That the people, in the adoption of this amendment,

intended to abolish the double liability provision of the Constitution, leaving the single liability as the only and maximum penalty to which the stockholder should be subjected, there can, we think, be no doubt; and this affords us another important rule in its construction, to-wit: to give effect to the intent of the people in adopting it. (Cooley Const. Limt. 55; Broom's Leg. Max. 347; *Hamilton v. St. Louis Co. Ct.*, 15 Mo. 3.) Contemporaneous construction of this amendment verifies the position of defendant. So far as our knowledge extends, save in the case at bar, the construction contended for by defendant has been universally acquiesced in by the bench, the bar and the people. *Ochiltree v. Railroad Co.*, 54 Mo. 113; S. C., 21 Wall. 249; *Miller v. Manion*, 50 Mo. 55; *Prov. Sav. Inst. v. Jackson Place S. & B. R.*, 52 Mo. 552; Ib. 557.

These proceedings are unsupported by any law. Section 13, p. 291 of Wag. Stat., having been enacted for the purpose of enforcing the double liability clause of the Constitution of 1865, is in direct conflict with the amendment of 1870; and no proceeding can be had under it until it is amended by the Legislature. *St. Jo. &c., R. R. Co. v. Buchanan Co. Ct.*, 39 Mo. 485; *Sanger v. Upton*, 91 U. S. 56. A constitution is not self-enforcing, except when special provision is made for that purpese. The amendment of 1870 not only fails to provide for its own enforcement, but expressly provides against doing so, declaring, that, "dues from private corporations shall be secured by such means as may be *prescribed by law*." The Legislature has enacted no law for the enforcement of this amendment. Granting, however, that the amended constitution is capable of self-enforcement, in that case it must be done at common law. It could not be enforced under said section 13, seeing that it was enacted in 1866, to enforce the constitution of 1865, and is repealed by the amendment. (2 Story Eq. Ju. Sec. 1252, a. & b.; *Rankine v. Elliott*, 16 N. Y. 377; 10 Paige 290; 26 N. Y. 233 & 239; 14 How. 368; 22 id. 380· 2 Black 539.

Waters & Winslow for respondents.

The amendment of 1870 does not destroy the *individual liability* of stockholders in private corporations, but simply limits the power of the Legislature to extend such liability to an amount greater than the capital stock owned. The common law imposed no such liability. Ang. & Ames Corp., §§ 591, 594, 599 *et seq.* It had its origin in legislative enactment. Whatever the form of expression used in creating it, or whatever the extent to which it was carried, individual liability has a well understood and clearly defined meaning, viz: a liability *in addition* to the liability to pay up the stock subscription. If we show that the phrase "individual liability," as used in the statutes and constitutions of Missouri, have this "peculiar and appropriate meaning in the law," we shall insist that the rule of the statute shall govern "technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." Wag. Stat. 887, § 6.

The statute of 1845 (R. S. 233, § 13) imposed on the stockholder a liability for debts of the corporation in "double the amount of his stock, and no more." This has been treated as in the nature of a penalty. *Kritzer v. Woodson*, 19 Mo. 327; *Cable v. McCune*, 26 Mo. 371. Under the statute of 1855 (R. S. 372, § 13) there was a liability "to an additional amount equal to that of the amount of his stock." The change made by the latter statute in the *measure* of the individual liability is evident, but in no sense is there any change in the *nature* of the liability. The law remained thus until the constitution of 1865 went into operation. The limitation in that instrument, it will be noticed, is not upon the power of the Legislature to *extend* the *individual liability* of stockholders, but upon the power to *reduce* such liability. The substance is, that each stockholder shall be liable for not *less* than the amount fixed, but there is no provision that it may not be made *more*. The individual liability was increased by the amount of the

unpaid stock. By dropping out the words, "*and any amount unpaid thereon*," the unpaid stock is withdrawn by the amendment of 1870 from the reach of the creditor's execution, but the individual liability—the thing apart from the unpaid stock—still remained just as it was by the statute of 1855. The words, "but in no case shall any stockholder be individually liable in any amount *over or above* the amount of stock owned by him," are equivalent to a provision that "every stockholder may be made individually liable to the amount of the stock owned by him." Saying that the amount shall not be *over or above* a certain amount is plainly saying that it may be *at the most that amount*.

The changes made by the amendment are: *First*, the individual liability is reduced by the omission of the unpaid stock from the measure of the liability; *second*, the limitation upon the legislative power is so changed as to prohibit an individual liability *greater* than the amount of the stock owned, where it was previously so limited as to prevent it from being fixed *less* than the amount of stock owned, and any amount unpaid thereon; *and, third*, the harmony of the system is restored by remitting to the corporate body and the courts all questions growing out of the corporate liabilities, leaving the Legislature to deal with the *individual liability* of the members. If it had been the intention to abrogate individual liability altogether, some such language as this would have been used: "The Legislature shall pass no law imposing any individual liability upon the members of private corporations, but laws must be passed subjecting unpaid stock to the claims of creditors." The language used imports no such intent. The form of expression used in the original section is preserved, and the only change made is in the measure of the liability and the nature of the limitation. The *object*, to secure "dues from private corporations," and the *means*, making the stockholder "individually liable" are still retained. The only purpose of the original section and the amendment,

the enactments of 1845 and 1855, and the entire body of legislation on the subject in this country, is to secure the creditors of these corporations against improvidence and fraud by means of this individual liability. There could be no necessity for statutes and constitutions to secure the rights of creditors in the unpaid stock. At common law the unpaid subscriptions to the capital stock constitute a fund available to creditors who are unable to make their demands from the corporate body, and equity will lend them its aid to enforce the payment. *Ward v. Manfg. Co.*, 16 Conn. 593; *Henry v. R. R. Co.*, 17 Ohio 187; *Mann v. Pentz*, 3 N. Y. 422; *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Adler v. Manfg. Co.*, 13 Wis. 57; *Upton, assignee v. Tribilcock*, 91 U. S. 47. If we insert after the words "over and above," the words "an amount measured by," the whole controversy is at an end. That such is the purport of the language used, see *Briggs v. Penniman*, 8 Cowen 392; *The matter of the Empire City Bank*, 18 N. Y. 218; *Bank v. Ibbottson*, 24 Wend. 493; *The matter of the Hollister Bank*, 27 N. Y. 397; *Pettibone v. McGraw*, 6 Mich. 445; *Ohio L. Ins. & T. Co. v. Merchants' Ins. & T. Co.*, 11 Humph 11.

W. P. Asbury and A. B. Logan for respondents.

It is immaterial in this proceeding whether the stock held by appellant was paid up or not; the extent of liability is not measured or affected by the amount unpaid thereon. Appellant is liable to plaintiffs in this form of proceeding. *McClaren v. Franciscus*, 43 Mo. 452; *E. O. Pickering use of John W. Dryden v. Templeton*, 2 Mo. App. 224; *Curtis v. Harlow*, 12 Met. 3. A subscription of stock to a corporation is a contract, and the law fixing the liability of the subscriber, as it exists at the date of the subscription, enters into and forms a part of the contract. *Ireland v. Palestine, &c. Co.*, 19 O. St. 369.

The seeming conflict between the statutory provision under which the action is brought and the constitutional

amendment, as to the *measure* of liability, does not, nor can it, render the *remedy* imposed by the statute inoperative and void. The amendment not providing a *new* remedy, but only *restricting* the *extent* or *measure* of liability imposed by the old constitution, needs no legislative enactment to authorize a *remedy* against such a stockholder to the *extent* of the liability therein imposed, but the remedy provided for by section 13, as aforesaid, is not affected by the amendment to the constitution, except to the *extent* of the liability, which is not contended for by the plaintiffs in this action. The rule is this: An amendment to the constitution which simply restricts the *measure* of liability or the *extent* of power which may be exercised in the performance of either a legislative, judicial, executive or ministerial act, needs no subsequent legislation to carry its provisions into effect, but the extent of such power, under a former legislative enactment, is to be confined to the *limitation* imposed by the constitutional amendment. *St. Joseph Board, &c. v. Patton*, 62 Mo. 444.

Wood & Brinker for respondents.

It is immaterial in this proceeding whether the stock, held and owned by defendant, was paid up or not. The extent of liability is not measured or affected by the amount unpaid thereon. The liability of the stockholders to the creditors is wholly separate and distinct from their liability to the corporation on their subscriptions. *Coleman v. White*, 14 Wis. 700; *Walker v. Butler* (Sup. Ct. Ills.) 5 Ins. Law Journal, 335.

Hough, J.—At the June term, 1874, of the Johnson circuit court, the plaintiffs recovered judgment against the Warrensburg and Marshall Railroad Company for the sum of $5,788.96. In July of the same year an execution, issued upon said judgment, was duly returned *nulla bona*. Thereupon the plaintiffs, in pursuance of section thirteen of the general statutes in relation to corporations, applied to the

circuit court for an execution against the defendant, who was a stockholder in said railroad, for an amount equal to the amount of stock by him owned, together with any amount unpaid thereon. It was admitted at the hearing of the motion, that the defendant had fully paid the railroad company for all the stock subscribed for, or owned, by him. The railroad corporation was created, and the indebtedness to the plaintiffs was incurred, after the adoption of the constitutional amendment in 1870, in relation to the liability of stockholders in private corporations. Execution was issued against the defendant for an amount equal to the amount of stock owned by him, and he has brought the case here by appeal.

The only question which it will be necessary for us to consider is, whether, under the 6th section of the 8th article of the constitution of 1865, as amended in 1870, a stockholder in a private corporation can be made liable to a creditor of the corporation, when the whole amount of the stock owned by him has been paid. This section originally read as follows: "Dues from private corporations shall be secured by such means as may be prescribed by law; but in all cases each stockholder shall be individually liable over and above the stock by him or her owned, and any amount unpaid thereon in a further sum at least equal in amount to such stock." In 1870 it was amended so as to read as follows: "Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him or her." It has been very ingeniously contended by the counsel for the plaintiff, that while the foregoing amendment was intended to extinguish all individual liability over and above the amount of stock owned, it was also intended to make the stockholder individually liable for a sum *equal* to the amount of the stock owned by him. Authorities construing positive provisions in the statutes and constitutions of other states, creating an individual liability to the amount of the

stock owned, have been cited to show that such liability is distinct from, and in addition to, the ordinary liability of the stockholder to have his entire stock, and any amount remaining unpaid thereon, subjected to the payment of the debts of the corporation.

The key to the true interpretation of the amendment of 1870 is to be found, we think, in the negative form of expression therein employed. If the object of the provision had been to create an individual liability to the amount of the stock owned by any shareholder, that purpose would undoubtedly have been declared in express and affirmative terms, and not by way of mere inference from a negative and prohibitory form of expression. If the amendment of 1870 had declared in express terms that every stockholder should be individually liable to the amount of the stock owned by him, it might well be argued on the authority of the cases cited by the plaintiffs' counsel, that as they were already liable to the creditors of the corporation for the full amount of their stock, paid and unpaid, the constitution intended to provide further security for such creditors by super-adding the individual liability of stockholders in a sum equal to the amount of their respective shares of stock. But such is not the nature of the provision, and the authorities cited are therefore inapplicable. The language of the amendment of 1870 should be construed with reference to the language of the section which it superseded, and when so considered, all doubt as to its true construction will vanish. The individual liability created by the original provision was expressed to be a liability, to an amount named, "over and above the stock owned, and any amount unpaid thereon." Now the phrase "over and above the stock owned" as there used, clearly meant *in addition to the stock owned.* The prohibition contained in the amendment was, "in no case shall any stockholder be individually liable *in any amount*, over or above the amount of the stock owned by him or her;" that is, *in addition* to the amount of the stock owned by him or her. In other words the identical

liability which the constitution of 1865 declared should exist, the amendment of 1870 declared should no longer exist. No liability whatever was created by the amendment, but the liability created by the constitution of 1865 was, by the amendment, totally extinguished. The common law liability for the stock owned and any amount unpaid thereon remains unaffected, of course, by the amendment of 1870. The same purpose and effect now ascribed by us to this amendment have been heretofore attributed to it in the case of *Ochiltree v. Iowa R. R. Contracting Co.*, 54 Mo. 118, which case counsel have asked us to review. Though the conclusion there reached was not controverted in argument, and was announced without any discussion of the subject, we are satisfied of its correctness, and, for the reasons here given, shall adhere to it. The judgment of the circuit court must therefore be reversed, and the cause will be remanded.

The other judges concur, except Judge NORTON, who is absent.

REVERSED.

The following cases were reversed and remanded for the reasons given in the opinion delivered in the case of *Schricker et al. v. Ridings*, HOUGH, J., delivering the opinion in each case.

Cruce Parke and Co., v. Cockrell; *same v. Funk*; *same v. Brown*; *same v. Keiley*; *same v. Williams*; *same v. Brown*; *Schricker et al. . Riding & Co.*; *same v. Morrow*; *same v. Ward*; *Ganson et al. v. Morrow.*

STATE OF MISSOURI v. LAKEY, APPELLANT.

Indictment for Murder: CERTAINTY REQUIRED IN AVERMENTS AS TO TIME AND PLACE: "DID INSTANTLY DIE" INSUFFICIENT. An indictment for murder in the first degree, which describes the assault and then charges, that of the mortal wound inflicted by defendant the deceased "did instantly die," does not state with sufficient certainty the time and place of the death.

Appeal from Douglas Circuit Court.—Hon. J. B. WOODSIDE, Judge.

No brief was filed for appellant.

John A. Hockaday, Att'y Gen., for respondent.

The indictment is unquestionably good. The time and place of the assault is specifically set out at the beginning of the indictment, as having been committed at the county of Douglas and State of Missouri on the 16th day of May, 1874, and the cutting and killing are sufficiently set out in the use of the words "then and there," referring, as they necessarily do, to the time and place of the assault. *State v. Ames*, 10 Mo. 743; *Wells v. State*, 8 Mo. 52; Wharton on Homicide §§ 791, 809.

HENRY, J.—Defendant was indicted at a special term of the Douglas Circuit Court, held in July, 1874, for murder in the first degree, in killing James Abner. The indictment, except in one particular, is faultless, but is fatally defective in omitting to state when and where Abner died. It alleges the striking and cutting of the deceased with a bowie knife, and then proceeds to charge "that the said Eli Lakey, with the knife aforesaid, by the striking and cutting aforesaid did then and there give to him, the said James Abner, in and upon the said throat of him the said James Abner, one mortal wound of the length of six inches and of the depth of three inches, of which mortal wound James Abner did instantly die." The import of the words "did

instantly die" in their popular acceptation does not obviate the necessity of making a necessary averment in an indictment for murder, with the particularity required by repeated adjudications of this court. The indictment in the case of the *State v. Lester*, 9 Mo. 658, alleged that defendant did inflict divers wounds and contusions on the head of one Scott, of which he, the said Scott, "did instantly die." NAPTON, J., who delivered the opinion of the court, said, "Here the word *instantly* seems designed to supply the place of the words *then and there;* and the Attorney General insists that both in its popular and proper legal acceptation it will embrace everything which is conveyed by those words. This may be true so far as time is concerned, but in capital cases it has been thought expedient to require great strictness, and it would be difficult to foresee to what extent innovations would go, if we lose sight of the established precedents, so far as they fix the form of material averment." In the case of the *State v. Sides*, 64 Mo. 383, the same doctrine was held. In the case at bar defendant was convicted of murder in the first degree, but as the indictment is fatally defective, the judgment will be reversed and the cause remanded. **All concur, except** NORTON, J., **not sitting.**

REVERSED.

STATE OF MISSOURI v. STEELEY, APPELLANT.

1. Indictment: CERTAINTY OF AVERMENTS AS TO TIME, PLACE, AND PARTIES TO THE OFFENSE. An indictment for murder charged, that "on or about the — day of —, A. D. 1871, at the county of Jasper, in the State of Missouri," defendant and one W. S. "made an assault on H. S. with pistols, &c., * * * and did then and there, on purpose and of *his* malice aforethought, shoot off and discharge at &c., * * * and of the mortal wounds inflicted upon him, the said H. S. did *then and there instantly die.*" *Held*, 1st, that the indictment charges the time and place of the homicide with sufficient certainty; 2d, that it charges the commission of the offense upon both the defendant and W. S.

2. **Jurors**: PEREMPTORY CHALLENGES: STATE MUST ANNOUNCE HERS FIRST. In criminal cases the State must announce her peremptory challenges of jurors before the defendant can be required to announce his.

Appeal from Dade Circuit Court.

Robinson and Bray & Cravens for appellant.

I. The indictment is wholly insufficient, contradictory, repugnant and indefinite. 1st. It does not sufficiently charge when the act of shooting was done. 2nd. It does not charge when and where he died. 3rd. It is not certain whether the defendant is charged to have committed the offense or Wm. Steeley. 4th. It is uncertain whether defendant or Wm. Steeley made the assault. The charge is that "they, the said John Steeley, in each of their right hands had and held then, and there, and which pistols so loaded and charged and so had and held, were then and there each of them deadly weapons and which said pistols they the said John Steeley and William Steeley did then and there unlawfully, feloniously, willfully, deliberately, premeditatedly, on purpose, and of *his* malice aforethought, shoot off and discharge at, upon and against the body of the said Harvey Sitton, and did then and there unlawfully, feloniously, willfully, deliberately, on purpose and of *his* malice aforethought, by means of the pistol and gunpowder" &c. * * * and then concludes that by reason of the wounds inflicted by John and Wm. Steeley the said Harvey Sitton did then and there immediately die. In order to make a killing murder, it must be maliciously done. Who was it that entertained malice, was it John or William? *State v. Hardwick*, 2 Mo. 226; *State v. Hays*, 24 Mo. 358; *State v. Gray*, 21 Mo. 492; *Jane v. The State*, 3 Mo. 61.

II. The court should have compelled the State to make its challenges, and then the defendant should have had the list on which to make his challenges. Wag. Stat. 800 §§ 23, 24, 25,

J. L. Smith, Attorney General, for the State.

I. The indictment is sufficient, and charges the offense upon the defendant with necessary certainty, and is certainly good after verdict. Wag. Stat. page 1097, sec. 27; *State v. Craighead*, 32 Mo. 561; *State v. Dalton*, 27 Mo. 13. An indictment is sufficient if enough remains to constitute a charge of an offense after striking out the objectionable parts. *State v. Wall*, 39 Mo. 532; *State v. Edwards*, 19 Mo. 674; *State v. Hamilton*, 7 Mo. 300. An indictment which follows the words of the statute is sufficient. *State v. Mitchell*, 6 Mo. 147; *Spratt v. State*, 8 Mo. 247; *Simmons v. State*, 12 Mo. 268; *State v. Stubblefield*, 32 Mo. 563. And it is sufficient if the offense be set forth with substantial accuracy and certainty. *State v. Ross* 25 Mo. 426. We hold that that portion of the indictment objected to by defendant, *to-wit:* "which said pistols so loaded and charged, they, the said John Steeley," and "of his malice aforethought," as repugnant and uncertain, are cured by our statute of jeofails. WAG. STAT. 1090. And, if not, they can be stricken out and a sufficient indictment for murder in the first degree under our statutes will remain. Wag. Stat., page 445, Sec 1.

II. The court did not err in requiring the defendant to make his challenges without seeing the challenges of the State. The defendant had the full benefit of all his challenges and his case was not prejudiced in that respect. *State v. Hays*, 23 Mo. 287; *State v. Klinger*, 46 Mo. 224

HENRY, J.—At an adjourned term of the circuit court of Jasper county, held in December, 1875, the defendant was indicted jointly with William Steeley for the murder of Harvey Sitton, and at the same term, on his application, a change of venue was awarded to Dade county. At the April term of the Dade circuit court there was a trial of the cause, which resulted in the conviction of defendant of murder in the first degree, and judgment was entered accordingly, from which defendant has appealed. A mo-

tion to quash the indictment was overruled, and this is assigned as error. The grounds of objection to the indictment are that it does not, with sufficient particularity, allege when and where Harvey Sitton died of the wounds, which, it was charged, were inflicted upon him by the defendant, or when the act of shooting was done; *second*, that is is uncertain whether defendant or William Steeley is charged to have committed the offense.

The indictment charges that on or about ——— day of ——— A. D. 1871, at the county of Jasper, in the State of Missouri, John and William Steely made an assault upon Harvey Sitton with certain pistols, which they, said John and William, in each of their right hands had and held, and did then and there shoot off and discharge at, upon, &c. It alleges that John and William Steeley did then and there, on purpose, &c., and of *his* malice aforethought, shoot off and discharge, &c. It alleges that of the mortal wounds inflicted upon him, "the said Harvey Sitton, did then and there instantly die." Neither the case of *Lester v. The State*, 9 Mo. 658, nor the *State v. Sides*, 64 Mo. 383, sustains the objections to this indictment. The language of the indictment in *Lester v. The State* was "of which the said Scott did instantly die," and in the *State v. Sides* the language was that deceased "did immediately languish, and languishing did die." In the case at bar, the indictment states when the wounds were inflicted upon the deceased, and where it occurred, and the word "then" has relation to that time, and "there" to the place previously stated. It contains the very words which NAPTON, J., held, in *Lester v. The State*, would have made the indictment good in that case. The word used in the *State v. Sides*, "languish," imports that the death was not instantaneous, and the deceased may have languished more than a year and a day before he died, and the averment in the indictment have been true.

1. INDICTMENT: certainty of averments as to time, place and parties to the offense.

It is urged that it is not clear whether it charges that

defendant or William Steeley committed the offense, but we think it sufficiently clear that both are charged. It is alleged that each had a pistol in his hand, and substantially that each of his malice did the shooting. The ambiguity arises from the use of the words "his malice," instead of "their malice;" but a reasonable construction of the charge, taking all the allegations together, removes the obscurity and makes it sufficiently clear what was meant. Although inartificially drawn, the indictment is substantially good, stating all the facts necessary to constitute the crime of murder in the first degree, and in proper language. It is not like the indictment held bad in the case of the *State v. Gray*, 21 Mo. 492. Several were there indicted, and it was charged that *they*, with a knife which *they* then and there, with their right hand held, made an assault, &c. Scott, Judge, said: "This is an impossibility. It is on the face of it false, and must be bad." In the case at bar the charge is that each had a pistol in his right hand and made the assault, &c.

2. JURORS: peremptory challenges; State must announce hers first.

It appears by the bill of exceptions that after the venire of forty jurors had been made, and a certified list had been delivered to the State's attorney, and one to the accused, the State's attorney refused to exhibit his peremptory challenges to defendant's counsel, who claimed the right to see which challenges had been made by the State before the defendant should be required to make his; but his application to the court to require the State's attorney to exhibit to defendant his challenges was refused, and he was compelled to make his challenges without first being allowed to know who was challenged by the State. Sec. 21, Wag. Stat., page 800, provides that, "in the trial of civil causes, each party shall be entitled to challenge peremptorily three jurors; but when there are several plaintiffs and defendants, they shall join in their challenges, and the plaintiff shall, in all cases, announce his challenges first." Sec. 16, Wag. Stat., 1103, provides that "the proceeding prescribed by

law in civil cases in respect to impaneling of jurors, the keeping them together, and the manner of rendering their verdict, shall be had upon trials of indictment and prosecutions for criminal offenses, except in cases otherwise provided by statute." It was clearly the duty of the attorney for the State to announce his challenges, and defendant could not legally be required to make his challenges until this was done. It is a right secured to the defendant by the express provisions of the statute, and it was error to deprive him of it, and such an error as makes it imperative on this court to reverse the judgment and remand the cause. All concur, except NORTON, Judge, not sitting.

REVERSED.

ROBART, PLAINTIFF IN ERROR, v. LONG, ADMINISTRATOR OF ROBART.

Bill of Exceptions: PRACTICE. The bill of exceptions must be prepared and signed during the term, unless the court, by consent of parties, orders otherwise.

Error to St. Francois Circuit Court.—HON. LOUIS F. DINNING, Judge.

Pipkin & Taylor for plaintiff in error.

Carter & Clardy for defendant in error.

PER CURIAM: It is the settled law of this State that a bill of exceptions must be prepared and signed during the term, unless the court, by consent of the parties, orders otherwise. As the record shows that the plaintiff in this case is allowed sixty days after trial within which to prepare his bill, and no consent of the defendant appears on the record, the bill of exceptions must be disregarded and the judgment be affirmed.

AFFIRMED.

PEAKE ET AL. v. BELL, PLAINTIFF IN ERROR.

1. **Bill of Exceptions**: PRACTICE. *Robart v. Long*, Admr. (*ante* p. 223) affirmed.

2. **Failure to file exhibits**: PRACTICE. Failure to file the note sued on can not be assigned for error in the Supreme Court, unless the objection was made in the court below.

Error to Jasper Circuit Court.—HON. E. O. BROWN, Judge.

H. B. Johnson for plaintiff in error.

Lay & Belch for defendant in error.

SHERWOOD, C. J.—Action on promissory note. As in accordance with former rulings, we have stricken from the transcript in this cause what purports to be the bill of exceptions filed therein, because no consent was entered of record to file out of term (*West v. Fowler*, 59 Mo. 40, and cases cited; *Robart v. Long, admr.*) the record proper is all that remains for revision, and on inspection of this we discover no error. It is indeed claimed that although the petition is perfect on its face, yet as the note was not in fact filed with the petition, that this is such a defect as may be reviewed even in this court, though the defendant answered and made no objection in the lower court. This view is erroneous. The instrument sued on, constitutes no part of the record. (*Chambers v. Carthel*, 35 Mo. 374; *Phillips v. Evans*, 64 Mo. 17.) Our statute (2 W. S., 1022, § 51,) no longer requires "profert," as was the case when *McCormick v. Kenyon*, was decided. The cases of *Rothwell v. Morgan*, (37 Mo. 107,) and *Dyer v. Murdock*, (38 Mo. 224,) only decide that the failure to file the instrument may, after answer filed, be taken advantage of in the lower court by motion to dismiss, and that where a party, as in the latter case, in attempting to excuse non-filing, proffers in his pleading an excuse not warranted by statute, that this defect may be reached by demurrer. Our views on this

1. BILL OF EXCEPTIONS: practice.

2. FAILURE TO FILE EXHIBITS: practice.

point have recently found expression in *Burdsal v. Davies*, (58 Mo. 138,) and *Han. & St. Jo. R. R. Co. v. Knudson* (62 Mo. 569.) Judgment affirmed. All concur.

AFFIRMED.

LONG v. PACIFIC RAILROAD, APPELLANT.

Railroad: MACHINERY: NEGLIGENCE: FELLOW SERVANT: PERSONAL INJURY. A railroad company is liable to a brakeman for injuries received in the performance of his duties, through the negligence of the company's inspector of machinery in failing to discover and remedy defects in a brake. The inspector represents the company, and is not a fellow servant of the brakeman.

Appeal from Cole Circuit Court.—HON. T. M. RICE, Judge.

This was an action to recover damages for personal injuries sustained by plaintiff while engaged in the service of defendant as brakeman. The evidence tended to show that while plaintiff was in the act of drawing the brake on a freight car, which was in motion, the upright rod broke, the brake wheel came off, and plaintiff fell to the ground and received the injuries complained of; that at the point in the rod where it broke there was a crack, which, however, was concealed; that defendant employed men at different points on its line, whose duty it was to inspect and repair the cars and machinery; and that this car had been in service a considerable length of time. There was a conflict of evidence as to whether the crack in the rod was new, or of long standing, and as to the diligence used by defendant's servants to discover the defect. At the instance of the plaintiff the court gave, among others, the following instructions: 1. If the jury believe from the evidence that the plaintiff in the discharge of his duty was thrown from the defendant's cars and received the injury charged in the petition by the reason of the breaking of the end of the rod of the brake, or the thread on the end

of the rod of the brake being worn or broken, that the brake was, at the time, defective or insecure as aforesaid, that such defect or insecurity was not known to the plaintiff, that he used such care and prudence as is required of one engaged as brakeman, that the defendant by the exercise of reasonable foresight or diligence might have known of such defect or insufficiency of the brake, then the jury will find for the plaintiff. 2. Although the plaintiff in assuming the duties of brakeman did assume all the risks belonging to such employment, this did not relieve the defendant from its legal duty to provide suitable and safe machinery to carry on its business, and to maintain the same by the use of ordinary care and foresight. 3. The plaintiff had a right to presume that the defendant would furnish and maintain safe brakes on its cars, and it is a question of fact for the jury to determine from the evidence whether the defendant did furnish a safe brake on its car, and use ordinary and reasonable care and foresight in keeping the one alleged to have been broken in safe repair, and in determining this question they may take into consideration all the circumstances detailed by the witnesses and the use to which the brake is put.

The court gave the following, among other, instructions asked by the defendant: 12. If the jury believe from the evidence that the said crack or flaw in said brake rod was concealed by the wheel washer or burr on said brake rod, and that the car inspectors of defendant could not have discovered the same by the exercise of ordinary care and diligence, then the plaintiff cannot recover in consequence of injuries received thereby. 15. If the jury believe from the evidence that there was an old crack in said brake rod and the same was hid from view by the wheel and the bar on the top of the wheel, so that neither plaintiff nor defendant could discover the same by the exercise of ordinary care, then plaintiff cannot recover for the injuries mentioned in his petition. 19. It devolves on the plaintiff to show by affirmative and satisfactory proof that the

plaintiff was injured and that such injury was occasioned by the negligence of defendant in furnishing plaintiff an unsound brake on its road, and that defendant knew or could have known of the unsound condition of said brake by the exercise of ordinary care and diligence, and in the absence of such affirmative and satisfactory proof the jury must find for defendant.

The court refused to give the following instructions asked by defendant: 5. If the jury believe from the evidence that plaintiff was injured by the breaking of the brake rod and the falling of plaintiff from the car, and that the same resulted from accident, then the plaintiff cannot recover. 7. The law does not impose on railroad corporations as to its employees the duty of furnishing and using good and safe cars, brakes and fixtures belonging thereto and to keep the same in good and safe repair. The defendant assigned as error the action of the court in giving plaintiff's instructions and refusing defendant's instructions numbered 5 and 7.

J. N. Litton for appellant.

1. The law does not impose upon defendant the duty of warranting that all its machinery is the best and in perfect order, still less that all of it will continue to be so for ever and never break. 30 Mo. 116, *McDermott v. P. R. R.*; 42 Ala. 723, *M. & O. R. R. Co. v. Thomas;* 12 Ohio St. 494, *Railroad v. Webb*; 5 Ohio St. 541, *Mad River R. R. Co. v. Barber*; 31 Ind. 174, *Col. & Ind. R.R. Co. v. Arnold*; 23 Ind. 82, *Slattery v. T. & W. R. R. Co.*; 10 Ind. 556, *Ind. R. R. Co. v. Love*; 32 Vt. 473, *Hard v. Vt. & C. R. R. Co.;* 28 Vt. 61, *Noyes v. Smith*; 39 N. Y. 471, *Warner v. Erie R. R. Co.;* 14 Gray 468, *Seaver v. Boston R. R.*; 46 Illinois 100, *Ills. Central R. R. Co. v. Jewell;* 49 Barber 324, *Faulkner v. Erie R. R.* 2. Even if Welsh or any other inspector was negligent in not discovering the defect in the brake, defendant is not liable for his negligence, for it was nothing but the negligence of a fellow servant. Wharton on Neg. § 227;

McMillan v. Saratoga R. R. Co., 20 Barb. 450; *Tinney v. B. & A. R. R. Co.*, 62 Ib. 218; *Tarrant v. Webb*, 37 Eng. L. & E. 281; *Waller v. S. E. R. R.*, 2 Hurl. & Colt. 102; *Hall v. Johnson*, 3 Ib. 589; *Searle v. Lindsay*, 8 Jur. (N. S.) part 1 p. 746; *Brown v. Accrington*, 3 Hurl. & Colt. 511; *Potts v. Port Carlisle D. & R. Co.*, 8 Week. Rep. 524; 2 Law Times (N. S.) 283; Fisher's Dig. p. 5758; *Ormond v. Holland*, 1 Ellis B. & E. 101; *Couch v. Steel*, 3 Ib. 402.

Lay & Belch for respondent.

1. Respondent's instructions were correct. *Brothers v. Cartter*, 52 Mo. 372; *Patterson v. Pittsburgh &c. R. R.*, 2 Cent. L. J. 639; *Harper v. Indianapolis R. R.*, 47 Mo. 567; 45 Ills. 201; 52 Ills. 183; *Ryan v. Fowler*, 24 N. Y. 410; *Bugard v. Laceria Man'g Co.*, 47 Me. 113; *Hollowin v. Hanly*, 6 Cal. 209; *Frazier v. The Penn'a R. R. Co.*, 2 Wright 111; *Caldwell v. Brown*, 3 P. F. Smith, 453; *O'Donnel v. Allegheny Valley R. R. Co.*, 9 Id. 239; *Weger v. Penn'a R. R. Co.*, 5 Id. 465; *Farwell v. Boston & W. R. R. Co.*, 4 Metcalf, 49; 43 Ills. 338; 8 Allen 441; 52 Mo. 253; 11 Wisconsin 238; Redfield on Ry. 473–475; S. & R. on Neg. 333, 95, 96. 2. Appellant's 5th and 7th instructions were properly refused. 2 Camp. 70, *Griggs Christer v. Greggs;* 11 Pick. 106; 4 Gill 406, *Stockton v. Frey;* 13 Pet. 181, *Stokes v. Saltonstall*; 38 Miss. 242; 30 Penn. St. 234; 2 Duval (Ky.) 556, *Louisville & P. R. R. v. Smith;* 5 Q. B. 411, *Kearney v. London & B. R. R. Co.;* 2 H. & C. 722, *Byrne v. Boadle;* 12 Jur. (N. S.) 705, *Higgs v. Maynard;* 35 L. & J. Ex. 163, *Briggs v. Oliver;* 4 H. & C. 403; 5 Q. B. Law Report 511; 1 Redf. on Railways 522; 28 Vt. 180, *Briggs v. Taylor;* 31 Ind. 175; 19 N. Y. 127, *Smith v. N. Y. & Harlem R. R.;* 17 Wallace 553, *R. R. Co. v. Fort;* 2 Dillon 64, *Jones v. Yaeger;* 2 Dillon 294, *Stout v. Sioux City R. R.;* 2 Dillon 259, *Fort v. Union Pac. R. R.;* 28 Vert. 59; 20 Ohio 415, *Little Miami R. R. v. Stevens;* 1 Amer. R. R. cases 569–70, *Dixon v. Ranken;* 3 Dillon 319, *Dillon v. Union P. R. R.;* 10 Allen 233; 110 Mass. 240, *Ford v. Fitchburg R. R.;* 4

Foster & T. 608; 24 N. Y. 175; 10 Gray 274, *L. & N. R. R. Co. v. Collins;* 5 Amer. L. Reg. 265; 5 (Port.) Ind. 339, *Gillenwater v. Mad. & Ind. R. R.*; 11 Wis. 238, *Chamberlain v. Mil. & Miss. R. R.*

NAPTON, J.—In regard to the responsibility of a railroad company to supply suitable machinery to their employees, and to keep the same in repair, there is no difference of opinion among the courts, but a very decided difference has arisen in relation to the duty of maintaining suitable machinery, so far as the claims of employees are concerned, some courts holding that when the company employs competent inspectors and repairers, and an injury occurs through their negligence, no liability attaches to the company, regarding the injury as one resulting from the negligence of fellow-servants; whilst other courts have held that the duty in regard to machinery is one as to which, although it is performed by subordinates, the company is in fact represented by such agents, and their carelessness is not put on a footing with that of fellow-servants of the party injured. This court has in *Gibson v. Pacific R. R.*, 46 Mo. 163, and in *Lewis v. St. Louis & Iron Mountain R. R.*, 59 Mo. 495, adopted the latter view, following the cases of *Snow v. The Housatonic R. R.*, 8 Allen 441, *Ford v. Fitchburg R. R.*, 110 Mass. 240, and *Flike v. B. & A. Co.*, 53 N. Y. 549. This last case was decided by an equally divided court, and the cases of *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 412; *R. R. Cos. v. Webb*, 12 Ohio State 475; *Waller v. S. E. R. R. Co.*, 2 Hurl. & C. 102, maintain the contrary doctrine. The case in Ohio is in its facts very much like the present, and the court held the inspectors of the brake fellow-servants with the brakemen, and, therefore, held the company not responsible for the inspectors' negligence. In the case now before the court the instructions of the circuit court followed the views of this court in the above cited cases, in which this court considered the supervisors of the track and the inspectors o

the machinery as virtually representing the company. As the authorities are conflicting and irreconcilable, and it is not clear that public policy authorizes or requires any departure from former decisions, the judgment of the circuit court must be affirmed. The other judges concur.

AFFIRMED.

COLLINS v. ATLANTIC & PACIFIC R. R. CO. APPELLANT.

Railroad: FORTY-THIRD SECTION: PLEADING: EVIDENCE: NEGLIGENCE. In an action against a railroad company for killing stock the petition alleged that the defendant carelessly and negligently ran its train over the stock, and that the point on the road where this occurred was not at the crossing of any public road or highway, and was at a point where the railroad ran through uninclosed prairie lands, and was not fenced. *Held*, 1st, that the action was based exclusively on the 43rd section of the railroad law; 2nd, that evidence of negligence in running the train, or evidence to prove that the killing occurred within eighty rods of a public crossing, and that the whistle was not blown or the bell rung, as required by the 38th section, was irrelevant.

Appeal from the Common Pleas Court of Cass County—HON. JNO. L. MORRISON, Judge.

J. N. Litton for appellant.

The giving of the second instruction was an entire departure from the case made by the petition. The petition was founded upon the statute requiring a fence, and, therefore, any other character of proof or instructions were illegal. 60 Mo. 212, *Cary v. St. L., K. C. & N. R. R. Co.*; 31 Mo. 399, *Quick v. Han. & St. Jo. R. R.*; 31 Mo. 407, *Miles v. Han. & St. Jo. R. R.* This instruction casts loose from the case set up in the petition, and after looking through the statutes finally settles down upon 1 Wag. Stat. 310, § 38, and proceeds to instruct the jury, not upon what will authorize a recovery under the statute on which the petition was framed, or even under the requirements of the common law, but under a separate and distinct statute giving

a cause of action where none existed at common law; certainly this cannot be the proper practice. 45 Mo. 258, *Kennayde v. Pacific R. R.;* 1 Saund. 135, N. 3; 5 East 244; Saund. Pl. & Ev. 830; 17 Wend. 88, *Bayard v. Smith;* 1 Chitty's Plead. 372; 2nd Chitty's Plead. 504; 26 Mo. 147, *Walther v. Warner.* Instructions as to issues not raised by the pleadings are improper. 43 Mo. 591, *Camp v. Heelan.* No brief was filed for the respondent.

HENRY, J.—This was an action in the Common Pleas court of Cass county to recover damages against defendant for the killing of a mare belonging to him by a train of cars passing over defendant's road. The petition alleges that defendant carelessly and negligently ran its cars, engines and locomotives over the said mare, and that the point on said road where it occurred was not at the crossing of any public road or highway, and was at a point where the road ran through uninclosed prairie lands and was not fenced. The facts as disclosed by the evidence, and not controverted, are that the mare was killed on defendant's road, about 40 rods from a crossing of a public highway which the train was approaching. That at that point the road ran through uninclosed prairie land and was not fenced. The court permitted plaintiff to prove that the whistle was not blown nor the bell rung on the train, and against defendant's objection admitted evidence in regard to the speed of the train. The court, at the instance of plaintiff, declared the law to be as follows: "*First*, that the defendant, its servants and agents in the control of its train, were bound to use reasonable care in the management of its train to avoid doing injury to stock on its road, and if the court, sitting as a jury, should believe from all the evidence and circumstances proved in evidence, that the defendant, its servants and agents, could by the use of reasonable care and diligence have avoided killing plaintiff's mare, it ought to find a verdict for plaintiff; *second*, although the court may find from the evidence

that said mare did stray upon said railroad at a point where defendants were not bound to fence the road, yet if the court, sitting as a jury, shall believe from the evidence that said mare was on said road of defendant at a point within or less than eighty rods where said railroad crosses a public traveled road or highway, or street in a town, in the direction towards which the said train or locomotive was approaching, and that defendant neglected to ring the bell or sound the whistle on said locomotive from a point eighty rods distant from said crossing, highway or street, and neglected to keep said bell ringing or said whistle sounding at intervals, until said locomotive and train had crossed said public highway or street, and that plaintiff's mare was struck and killed at said point upon defendant's road by defendant's locomotive, cars and engine, within said distance of eighty rods from said crossing, then the court should find for plaintiff, &c." There was a finding and judgment for plaintiff for $125, from which defendant has appealed to this court.

We shall not attempt to consider all the errors presented by this record and discussed in the appellant's brief. The action was evidently based on the 43rd Sect., Art. 2 of the corporation act, and all that plaintiff had to do to make out his case, was to prove that the mare got on the track, at a place on the road where it ran through unin-closed prairie land, and not at a public crossing, and that the sides of the road there were not fenced. Evidence of carelessness in running the train was irrelevant and inadmissible, as was also the evidence to prove that the accident occurred within eighty rods of a public crossing, and that the whistle was not blown, or the bell rung. The suit was under Sec. 43, Art. 2 of the corporation act, and yet the instructions, ignoring the cause of action alleged in the petition, presented the case, the first instruction as an action for negligently killing the mare, and the second as an action under Sec. 38, Art. 2 of the corporation act. The evidence and instructions should have been confined to the

cause of action stated in the petition, and it was error to admit testimony, or give declarations of law in regard to any other. *Wood v. St. L., K. C. & N. R. R. Co.*, 58 Mo. 109; *Tyark v. The Iron Mt. R. Co.*, Ib. R. 48. Judgment reversed and cause remanded. All concur, except HOUGH, J., and NORTON, J., not sitting.

REVERSED.

LOCKWOOD v. HANNIBAL & ST. JOSEPH R. R. CO., APPELLANT.

1. **Lands**: SALE, RESCISSION OF: OUSTER IN PAIS. If a vendee of land, holding possession under an executory contract of sale, surrenders the possession to a stranger as owner of the paramount title without suit and in the face of the vendor's promise to make the title good, he can not afterwards demand a rescission of the contract.

2. **Swamp Lands, title to**: EVIDENCE. To show title to a tract of land in one claiming under the swamp land grant of Congress and the State Legislature (U. S. R. S. p. 456 §§ 2479-2481; Sess. Acts 1851 p. 238) it is not sufficient to prove that the tract was on the 28th day of September, 1850, swamp or overflowed land. There should be evidence that it has been selected or designated as such by State or Federal authority.

Appeal from Livingston Circuit Court.—HON. JONAS J. CLARK, Judge.

James Carr for appellant.

1. The petition does not allege that the respondent was evicted by title paramount, or that he surrendered or offered to surrender possession of the premises to appellant. Without one or the other of these facts existed he has no right to recover the purchase money. *Tompkins v. Hyatt*, 28 N. Y. 1; *Moore v. Smedburgh*, 8 Paige 600; *Bruce v. Tilson*, 25 N. Y. 198. Having gone into possession under an executory contract, he was under a legal obligation to restore possession to appellant when he discovered the defect in the title. If he had done so, he would now be in position to claim rescission of the contract; but instead

of this he voluntarily surrendered possession to the enemy of the appellant, and thereby put it out of his power to discharge this obligation. *Wallace v. Boston*, 10 Mo. 660; *Owens v. Rector*, 44 Mo. 389. He was in quiet and undisturbed possession, and might never have been disturbed. Time was quietly and steadily building him up a title. Why was he so anxious to surrender to Duell? There is no allegation that he ever requested appellant to buy in or in any way to quiet the title after he discovered the defect. The sale of swamp lands was public. He could have bought it in himself and claimed a credit on his contract with appellant; but he took no step to protect his title. His own deposition shows that he acted in collusion with Duell. 2. There was no evidence that said land had ever been selected by the State or Livingston county and reported to the commissioner of the General Land Office under the act of Congress in regard to swamp lands, or that any list or plat thereof had ever been made out by the Secretary of the Interior and transmitted to the Governor of the State.

H. M. Pollard for respondent.

The swamp land grant was a present grant, vesting the title absolutely in the State without any selection. *Smith v. R. R. Co.*, 9 Wall. 95; *Campell v. Wortman*, 58 Mo. 258; *Clarkson v. Buchanan*, 53 Mo. 563. Plaintiff was not obliged to wait till he was ejected. He can sue for breach of covenant, or to rescind the contract at any time when he discovers that the paramount title is outstanding or that his grantor can not fulfill his contract. All he need do is to show that defendant had not the title. Sugden on Vendors, pp. 8, 244–5, 282–3, and 288. Hilliard on Vendors, pp. 8, 35, 223, 300 § 20, 301 § 21; Rawle on Covenants, 604; *Washington v. Ogden*, 1 Black 450. The covenants were not concurrent and the vendee had a right to rescind at any time and after any payment, provided the vendor was unable to comply with his covenants. See *Butler v. Manny*, 52 Mo. 506;

Parsons on Contracts, Vol. 3, 406–7–8; Vol. 2, 678–80. The plaintiff did all in his power to put defendant into possession. He demanded back his money and offered to rescind and offered to keep the land if defendant would make a good title. Defendant stood still and did nothing but let plaintiff be sold out and never tried to protect him. Neither was he bound to surrender possession; he had a right to rely on defendant's promise to protect him.

Hough, J.—On the fifth day of January, 1869, the plaintiff entered into a written contract with the defendant for the purchase of a certain tract of land in the county of Livingston, containing forty acres, at the price of ten dollars per acre, to be paid for in ten annual installments, upon the payment of which the defendant bound itself to execute to the plaintiff, his heirs or assigns, a deed therefor conveying the fee with the usual covenant of warranty. On the 7th day of May, 1869, another contract was entered into between the plaintiff and defendant for the purchase by plaintiff of a certain other tract in said county, containing eighty acres, at the price and on the terms stated in the first contract. Plaintiff went into possession of both tracts under and in pursuance of said contracts. After the payment of one installment of the purchase money, the plaintiff having heard that the lands purchased by him were not the property of the defendant, but belonged to the county of Livingston, as a part of the swamp land grant, so informed the defendant, and defendant replied that it would make the title good. In May, 1871, both of the tracts purchased by the plaintiff were sold by the county of Livingston as swamp lands, and one H. S. Duell became the purchaser, to whom, as owner of the paramount title, the plaintiff surrendered possession without suit, and so far as the record shows, without demand made therefor. There was testimony tending to show that the lands in question were swamp lands, but there was no testimony tending to show that the same were ever selected, or other-

wise designated, as such under the Act of Congress of September 28th, 1850, either by the State or the Federal authorities. The plaintiff testified in regard to the sale of these lands by the county, as follows: "I wanted to have him (Duell) buy them, him or some one else, I should say, besides the railroad company. I had spoken to Mr. Duell about buying them, had spoken to others about it, from the fact that they were to be sold at much less figures than I was to pay the railroad company." In September, 1872, the plaintiff instituted the present suit for the rescission of the two contracts before mentioned, on the ground that the defendant had no title to the lands sold. The circuit court rescinded the contracts and gave the plaintiff judgment for the portion of the purchase money paid by him, and the defendant has appealed.

We are not aware of any case in which it has been held that a vendee of land holding possession under an executory contract of sale, may suffer what is known as an *ouster in pais*, and then ask for a rescission of the contract. In such case the vendee would by his own act render impossible the mutual restoration necessary to rescission. *Smith v. Busby*, 15 Mo. 387. And it may be that the relation of vendor and vendee, which in an executory contract is held to be equivalent to that of landlord and tenant, would render the voluntary surrender of possession by the latter to a stranger, even after a demand made by him, ineffectual for any purpose, as against his vendor. *Ash, adm'r v. Holder*, 36 Mo. 163. The extract made from the plaintiff's testimony does not evince that good faith on his part, which should have characterized the conduct of one in his situation.

The stipulations for the payment of the purchase money and the making of the deed were not dependent but independent undertakings, and, conceding that the title was in the county, it does not appear but that the defendant might acquire the same in time to perform its contract. The facts stated in the record would certainly have con-

stituted no defense to an action by the defendant for the annual installments of the purchase money, which were due when this suit was instituted; *Smith v. Busby*, 15 Mo. 387; *Harvey v. Morris*, 63 Mo. 475. And if a suit for rescission by the vendee can only be maintained in cases where such vendee might, as defendant, successfully resist an action against him on the notes for the purchase money, then it is plain that, on the case made, the plaintiff was not entitled to relief. But even if it be conceded for the sake of argument, that the doctrine of *ouster in pais* can be invoked in a case like the present, still it does not appear that the title to the lands in question was in the county of Livingston. It did not suffice for the purpose of showing title in the county, to show simply that the lands in question were swamp lands. Although the Act of Congress of September 28th, 1850 has been several times declared to constitute a present grant, yet in the case of the *R. R. Co. v. Fremont County*, 9 Wall. 89, and in every case decided by this court where the title has been held to be vested in the county under the provisions of said act and by virtue of State legislation, there was some selection, or designation, by State or Federal authority, of the subject matter of the grant. In the case at bar, no such selection, or designation, was ever made. *Morgan v. Han. & St. Joe R. R. Co.*, 63 Mo. 129. For the foregoing reasons the judgment will be reversed and the cause remanded. The other judges concur, except Judges NORTON and HENRY, who were not members of the court when this cause was submitted.

REVERSED.

COOPER v. HANNIBAL & ST. JOSEPH R. R. CO., APPELLANT.

Affirms Lockwood v. Hannibal & St. Joseph R. R. Co., ante p. 233.

Appeal from Livingston Circuit Court.—HON. SAMUEL A. RICHARDSON, Judge

James Carr for appellant.

W. C. Samuels for respondent.

HOUGH, J.—On the 10th day of January, 1865, the plaintiff entered into a contract with the defendant for the purchase of a certain tract of land in Livingston county, to be paid for by the plaintiff in ten annual installments, upon the payment of which, the defendant was, by the terms of said contract, bound to execute to the plaintiff a deed conveying said premises in fee simple, and containing the usual covenants of warranty. The plaintiff went into possession of said premises under the contract aforesaid, and made the annual payments required thereby, until the year 1870, when, having been informed that the defendant had no title and that the same was vested in the county of Livingston, he declined to make any further payments. In May, 1871, said land was sold by the county of Livingston as swamp land, and soon thereafter the plaintiff surrendered possession of the same to the county's grantee, as the owner of the paramount title. Plaintiff thereupon brought the present suit to rescind the contract made by him with the defendant, for the purchase of said land, and for the return of that portion of the purchase money which had been paid by him. It was admitted that the land in controversy was swamp land, but there was no testimony tending to show that the same had ever been selected, or in any manner designated, by the State or Federal authorities, as being embraced within the congressional grant of September 28th, 1850. The circuit court rendered judg-

ment as prayed, and the defendant has brought the case here by appeal. The question of law arising upon the foregoing statement of facts, it will be seen at once, are precisely the same as those discussed and determined in the case of *Geo. E. Lockwood v. The Han. & St. Joe R. R. ante*, (p. 233) and for the reasons there given the judgment in this case will be reversed and the cause remanded. Judges NORTON and HENRY were not on the bench when this case was submitted. The other judges concur.

REVERSED.

HANNIBAL & ST. JOSEPH R. R. CO. APPELLANT, v. SNEAD.

Ejectment: RAILROAD GRANT: SWAMP LAND GRANT: EVIDENCE OF TITLE. As against a plaintiff claiming title to land under the railroad grant of Congress to the State of Missouri (10 U. S. Stats. 8) it is a sufficient defense in ejectment, if it is shown that the land was swamp and overflowed land within the meaning of the act of Congress granting such lands to the several States (U. S. R. S. p. 456 §§ 2479-2481), whether the proper steps have been taken to perfect the defendant's title or not. Swamp lands are excepted from the operation of the railroad grant.

Appeal from Livingston Circuit Court.—HON. JONAS J. CLARK.

James Carr for appellant.

H. M. Pollard for respondent.

HOUGH, J.—This was an action of ejectment, and the record of the cause is evidently defective. The pleadings and a portion of the instructions would seem to indicate that the plaintiff and the defendant both claimed title under the county of Livingston. But in the bill of exceptions it appears, that the only title set up by the plaintiff at the trial was under the Act of Congress of June 10th, 1852, granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State. The defendant claimed

title under the county of Livingston, which undertook to convey the same as part of the swamp lands granted to the State by the Act of Congress of September 28th, 1850, and to the counties in which they were situate by the act of Assembly of December 13th, 1855. There was testimony tending to show that the land in controversy was swamp and overflowed land within the meaning of the Act of Congress of September 28th, 1850. The defendant had judgment and the plaintiff has appealed. If the lands in question were swamp lands, they were excepted from the grant made by the Act of Congress of June 10th, 1852, and the plaintiff had no title and could not recover. Whether the proper steps had been taken to vest the title in the county of Livingston, it is needless to inquire. The question whether the lands sued for were swamp lands, was submitted to the jury under appropriate instructions, and their finding will not be disturbed. It is perhaps wholly unnecessary to remark that this case is unlike the case of *Morgan v. R. R.*, 63 Mo. 129. There it devolved upon the plaintiff to show title in the county, and it was held that while proof that the lands were swamp excepted them from the railroad grant, such proof was not of itself sufficient to show that the title had vested in the county. The judgment will be affirmed. All the judges concur.

AFFIRMED.

DUDLEY, APPELLANT v. MCCLUER.

Evidence of Good Character: PRACTICE. The fact that defendant is charged in the petition with fraudulent dealing, furnishes no ground for the introduction of evidence to prove his good character.

Appeal from Greene Circuit Court.—HON. W. F. GEIGER, Judge.

Bray & Cravens for appellant, as to the admissibility of the evidence to establish the general good character of respondent for truth and veracity, cited among others, *Goldsmith v. Picard*, 27 Ala. 142; *Lander v. Seaver*, 32 Vt. 114.

C. W. Thrasher & H. C. Young for respondent on the same point cited among others, *Ruan v. Perry*, 3 Caines 120; *Townsend v. Graves*, 3 Paige 455.

HENRY, J.—This was a suit in the Greene Circuit Court commenced in October, 1873. Plaintiff in his petition states that in December, 1859, defendant McCluer, and George R. and Clark Barrett, executed their note to Hash & Dudley, a firm composed of John Hash and Pullam Dudley, for $1,050, payable April 1, 1860, with ten per cent. interest per annum from its maturity; that on a settlement of the partnership, the note in question, became the property of said Pullam Dudley; that on the 28th day of January, 1866, said McCluer falsely and fradulently represented to said Dudley that he had paid a number of debts specified in the petition, on which he had been garnisheed as the debtor of said Hash & Dudley, amounting to within $414 of the amount of the said note executed by him to Hash & Dudley, and induced said Dudley to accept, in satisfaction of said note $414, and to deliver up the note to defendant; that said Dudley assigned said demand to plaintiff, who asks that said settlement be set aside, and for judgment for the balance of said note and interest.

Defendant, in his answer, denies all of the allegations, except the execution of the note and the payment of the $414 in satisfaction of the same; states that he was garnisheed before said settlement, in several suits against said Dudley & Hash, including those named in the petition; that said Dudley and defendant went to the office of the justice of the peace in which said attachment proceedings were pending, and procured a list of said demands, when said Dudley offered to take $414 in full settlement and satisfaction of said note, which defendant accepted, and that he then paid Dudley that amount and took up the note. For a further defense he states that he signed said note one year after its maturity, without receiving any consideration therefor, and that Pullam Dudley knew it at the time of the settlement, and also relied on the statute of limitation as a bar to the action. The replication states a sufficient consideration for the execution of the note by defendant, and a state of facts which avoids the plea of the statute of limitations, and as there was abundant evidence to support the replication in those respects, and appellant does not urge those defenses here, no further notice will be taken of them. The cause was tried at the May term, 1875, by the court without the intervention of a jury, a jury not having been waived by plaintiff, and the finding was for defendant, and judgment accordingly, from which plaintiff has appealed to this court.

Plaintiff contends that it was a proceeding in equity, and that this court can and should review the evidence in the cause. We have but to say in regard to this point, that it was either a suit in equity, or the court committed an error in trying it without the intervention of a jury, but as it was treated by the court and the counsel, on both sides, as an equitable proceeding, and so tried without objection from either side, without examining the numerous authorities cited by the counsel, we shall regard it as a suit in equity, but, inasmuch as for an error which will be presently adverted to, the judgment will be reversed and

the cause remanded, we shall express no opinion as to the correctness of the finding of the court on the evidence. The court did not err in admitting, as evidence, transcripts of the records in the attachment suits, but did err in permitting defendant, before any attempt was made to impeach it, to introduce witnesses to testify to his good character. His character was not in issue. It is true he was charged in the petition with having made false and fraudulent representations, and the charge was calculated to affect his character indirectly, and so in every case where one is sued for a debt, and he denies it, or pleads payment, his character is somewhat involved in the investigation; but "putting character in issue is a technical expression, which does not mean simply that the character may be affected, but that it is of particular importance in the suit itself, as the character of plaintiff in an action of slander, or that of a woman in a suit for seduction." *Porter v. Seiler*, 23 Penn. St. 424. In those excepted cases, character affects the amount of the recovery. The jury are, by law, permitted to consider it in assessing damages, and it is in that sense that it is said that "the nature of the action puts the character in issue." *Fowler v. Ætna Ins. Co.*, 6 Cowen 674; *Humphrey v. Humphrey*, 7 Conn. 116; *Gough v. St. John*, 16 Wendell 646. In the case of *Humphrey v. Humphrey*, *supra*, the defendant in a suit for a divorce was charged with adultery, and the court held that evidence of her good character was inadmissible, although the evidence against her was circumstantial only. In *Gough v. St. John*, the suit was for a false and fraudulent representatation of the solvency of a third person, and it was held that evidence of defendant's good character should not be received. Prof. Greenleaf, in his work on evidence, Vol. 1, Sec. 54, remarks, that "generally in actions of tort, wherever the defendant is charged with fraud from mere circumstances, evidence of his general good character is admissible to repel it," but Knox, J., in *Porter v. Seiler*, 23 Penn., says: "he is not sus-

tained by any authority I can find save *Ruan v. Perry*, 3 Caines 120, and this is expressly overruled in 16 Wendell." We may add that the case of *Fowler v. The Ætna Ins. Co.*, 6 Cowen, seems to sustain Greenleaf, but is an authority against the admissibility of the evidence of character when the evidence of fraud is direct and not circumstantial. See also *Rogers v. Lamb*, 3 Blackford 155; *Givens v. Bradley*, 3 Bibb 195; *The Attorney General v. Bowman*, 2 Bos. & Pul. 532, note A; *Anderson v. Long*, 10 Serg. & R. 55. With the concurrence of the other judges, except SHERWOOD, C. J., not sitting, having been of counsel, and NORTON, J., not sitting, the judgment is reversed and the cause remanded.

REVERSED.

McCOY ET AL. v. FARMER ET AL., PLAINTIFFS IN ERROR.

1. **Reviewable Errors:** MOTION FOR NEW TRIAL. The Supreme Court will not review the action of the trial court in overruling a motion to dismiss the suit on the ground that the charter of the plaintiff corporation had expired, and in permitting a substitution of parties and revival of the suit, unless these were assigned as errors in a motion for new trial.
2. **Instructions** upon a state of facts, which is shown by the concurring testimony of all the witnesses not to have existed, are properly refused.
3. **Statute of Limitations:** PROMISSORY NOTE: DAYS OF GRACE. The statute of limitations does not begin to run against a promissory note until three days after the date, when, by its terms, it is due.
4. **Dissolved Corporation, Debts to.** Debts due a moneyed corporation do not become extinct upon its dissolution.

Error to Cass Circuit Court.—HON. F. P. WRIGHT, Judge.

Defendant's motion to dismiss the suit referred to in the opinion of the court, assigned the following grounds, viz: 1st. That plaintiff's charter expired by limitation on the 22nd day of February, 1873, and plaintiff cannot now

further prosecute in said action. 2nd. That by reason of the expiration of plaintiff's charter plaintiff has no existence and cannot maintain the action. 3rd. That upon the dissolution of plaintiff as a corporation, by reason of the expiration of its charter, the demand sued upon became extinct.

Hall & Given for plaintiff in error.

I. Upon the expiration of its charter the corporation was fully and completely dissolved, and no steps had been previously thereto taken by creditors, or other persons, to wind up its affairs by having a receiver appointed, or otherwise. It is well settled that upon the dissolution of a corporation the debts due to and from it are totally extinguished, unless that result has been averted by some provision in the charter or by the operation of some statute, general or special, which was not the case here. Angel & Ames, Corp., 7th Ed., Sec. 779; *Miami Exporting Co. v. Gana*, 13 Ohio 269; *Renick v. Bank of West Union*, Ib. 298; *Conwell v. Pattison*, 28 Ind. 509. All suits then pending for it must therefore abate. Ang. & Ames Corp. p. 162. *Lindell v. Benton*, 6 Mo. 361 is not in conflict with this view. Besides, the company had transacted no business for near ten years before the commencement of this suit, had laid dormant, had exercised none of its functions or rights as a corporation for that period of time, had in fact ceased to exist long before the expiration of its charter. Even an act of the Legislature renewing a charter, passed after the corporation had been dissolved by expiration of its charter term of existence, will not revive its debts. Ang. & Ames on Corp., 7th Ed., p. 163, Sec. 196. *Comm. Bank v. Lockwood*, 2 Harring. (Del.) 8; *Foster v. Essex Bank*, 16 Mass. 245.

II. The court below erred in permitting the suit to be revived in the name of McCoy et al. as trustees. At the date of the expiration of the charter they were not directors thereof. It is admitted by them that no election

for directors had been held after the first Monday in April, 1861, near twelve years before the charter expired, and that but two meetings of this alleged board had ever been held, the first of which was in 1869. By the charter the directors were to hold only during the "ensuing year" after their election. They had therefore no power to hold over. *St. Louis v. Russell*, 9 Mo. 507; *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; *Han. & St. Joe R. R. Co. v. Marion Co.*, 36 Mo. 294; *Bank of Louisville v. Young*, 37 Mo. 398; *Ruggles v. Collier*, 43 Mo. 353; *Mathews v. Skinker*, 62 Mo. 329; *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294; *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Head v. Providence Ins. Co.*, 2 Cranch 127.

III. The motion to dismiss going to the then plaintiff's right to further maintain its suit, and the action of the court thereon having been preserved in the bill of exceptions, it occupied the same footing as a demurrer and was a part of the record proper and no part of the proceedings at trial, a matter of error and not of exception, and there was no manner of necessity for referring to it in the motion for a new trial. *Jones v. Manly*, 58 Mo. 559; *Peltz v. Eichele*, 62 Mo. 171; *Bateson v. Clark*, 37 Mo. 31; *State v. Matson*, 38 Mo. 489.

IV. The note was barred by the statute of limitations. *Presbrey v. Williams*, 15 Mass. 193; *Jacobs v. Graham*, 1 Blackf. 392; *Ryman v. Clark*, 4 Blackf. 329; *Little v. Blunt*, 9 Pick. 491; *Arnold v. U. S.*, 9 Cranch 104.

A. Comingo & R. O. Boggess for defendants in error.

Norton, J.—This suit was brought in the Circuit Court of Cass county by the Independence Fire and Marine Mutual Insurance Company on a note executed to it by defendants, due four months after date, and dated January 1st, 1861, for $96.73-100. This suit was instituted on the first day of May, 1871. The defendants appeared to the action, and filed their answer, subsequently to which time,

in November, 1873, the charter of the said company, by the terms of the act creating it, expired, at which time the present plaintiffs filed their petition in said court, praying that the suit be revived, and that they, being the last board of directors, should be permitted to prosecute the same as trustees for the benefit of those interested. The prayer of this petition was granted, the suit revived, and plaintiffs were allowed to prosecute the same, against the objection of defendants. The defendants answered the petition, denying the existence of said corporation, or that said plaintiffs were the directors of the corporation at the time of its dissolution, or had ever been such directors. They admit the execution of the note, but deny that there was anything due on it, and allege that they were only to pay said note when it should be necessary to meet losses, and that no losses had occurred. The right of plaintiffs to prosecute the suit as trustees is denied, and the statute of limitations is set up as a bar. The replication of plaintiffs denies all the allegations of the answer. On the trial plaintiffs obtained judgment for the amount of the note and interest, and defendants, having made an ineffectual motion for a new trial, bring the cause here by writ of error.

The only error complained of in the motion for new trial was as to the action of the court in giving the instructions asked by the plaintiffs and refusing those asked by the defendants. We will not, therefor, consider the action of the court in overruling defendants' motion to dismiss the suit, nor its action in reviving the suit and permitting plaintiffs to prosecute the same, neither of these causes being incorporated in the motion for a new trial. If they were intended to be relied upon here, they should have been so incorporated. It was due to the court below that its attention should have been thus called to all the matters complained of, and which would be relied upon as ground of reversal. This has been repeatedly held to be necessary by this court. *Acock v. Acock*, 57 Mo. 155; *Lancaster v. Washington Life Ins. Co.*,

1. REVIEWABLE ERRORS: Motion for new trial.

62 Mo. 121; *Curtis v. Curtis*, 54 Mo. 352; *Brady v. Connelly*, 52 Mo. 19.

The instructions given on behalf of plaintiffs, are as follow:

1. That defendants have introduced no evidence that shows a legal defense against the note sued on, and the jury are instructed to find for plaintiffs.

2. If the note was executed on the first day of January, 1861, and was made payable four months after date, and this suit was instituted on the first day of May, 1871, then defendants cannot avail themselves of the defense of the statute of limitations, and there is no evidence to the contrary.

The following instructions asked by defendants were refused:

1. If the jury find from the evidence that the note in controversy was signed and delivered by defendants, with the understanding and agreement that the note was only to be collected for the payment of losses sustained thereafter by the Independence Fire and Marine Insurance Company, and that said company did not, after the date of said note, sustain any loss, then the jury would find for defendants.

2. If the jury believe that plaintiff's cause of action did not accrue within ten years before the commencement of this suit, then they will find for defendants; and the jury are instructed that plaintiff's cause of action accrued on the 1st day of May, 1871.

3. The jury are instructed, that upon the dissolution of the Independence Fire and Marine Mutual Insurance Company by expiration of its charter, all debts due to said company became extinct; and the jury will find for the defendants.

One of the defendants testified that he did not know the exact consideration of the note, that he had signed it as security for Simpson, Glenn & Co., and that it had been given in renewal of a previous note. Another defendant, Glenn, testified that the note was exe-

2. INSTRUCTIONS.

cuted in renewal of another note to said company, and that the consideration of both notes was premiums earned by said company by insurance and interest on premiums after they became due. This was all the evidence offered by defendant, and we think it justified the court in giving the first instruction for plaintiffs, and in refusing the first asked for by defendants.

The case of *Pink v. Stahl*, 53 Mo. 437, fully justified the court in giving the second instruction for plaintiffs and refusing the second presented by defendants. It was there held that suit brought on the 13th day of September, 1871, on a note dated September first, 1871, payable ten days after date, was prematurely instituted, on the ground that the payer was entitled to three days of grace.

3. STATUTE OF LIMITATIONS: Promissory note; days of grace.

After the statement of the doctrine in Angell & Ames on Corporations, that at common law, after the civil death of a corporation, all debts due to and from it are totally extinguished, the author adds, that "the rule of the common law in relation to the effect of dissolution upon the property and debts of a corporation has in fact become obsolete and odious. Practically it has never been applied in England to insolvent or dissolved moneyed corporations, and in this country its unjust operation upon the rights of both creditors and stockholders of this class of corporations is almost invariably arrested by general or special statute." This we think has been done in the case at bar by an act of the legislature, passed in 1865, entitled "An act for the benefit of the Independence Fire and Marine Mutual Insurance Company," which provides that "the directors of the Independence Fire and Marine Mutual Insurance Company are hereby authorized to proceed to wind up the business of said company as speedily as they may deem it to the interest of the company to do so, and the said directors are hereby empowered to receive outstanding dividend certificates in payment of debts due the company on such terms as they may

4. DISSOLVED CORPORATION, DEBTS TO.

deem proper." Acts, 1865, p. 206. It is also provided in Sec. 21 Wag. Stat. 293, that upon the dissolution of any corporation already created or which may hereafter be created by the laws of this state, the president and directors or managers of the affairs of the corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of such corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money will enable them; to sue for and recover such debts and property by the name of the trustees of such corporation, describing it by its corporate name; and may be sued by the same. We therefore think in the light of these enactments that the court committed no error in refusing the third declaration of law asked for by defendants. Judgment affirmed, the other judges concurring.

AFFIRMED.

JOHNSON ET AL., PLAINTIFFS IN ERROR v. BEAZLEY.

1. **An Administrator's Deed** is not invalidated by reason of the fact appearing on its face that the land was appraised by only two householders.

2. ——: RECITAL. A recital in a deed and in the certificate of acknowledgment thereof, that it is executed by the grantor as administrator, is evidence of his appointment as administrator.

3. **Probate Court Judgments**: JURISDICTION, WILLS AND ADMINISTRATION. The probate courts of this state are courts of record, and their jurisdiction in respect to wills and the administration of the estates of deceased persons, is general, exclusive and original; and whilst any action on subjects not committed to their jurisdiction is of no force or validity, their action on these subjects is entitled to the same weight as that of any other court of record, and is conclusive in all collateral proceedings.

4. **Administrator's Deed**: JURISDICTION. It is not essential to the validity of an administrator's deed, that the record of the court from which he derived his appointment, shall show affirmatively the existence of all the facts necessary to authorize the appointment.

5. **Administrator's Appointment can not be questioned collaterally.** The appointment of an administrator can not, in a collateral proceeding, be invalidated by proof that the deceased, at the time of his death, had his place of abode in a county other than that in which the appointment was made.

Error to Crawford Circuit Court—HON. ELIJAH PERRY, Judge.

J. R. Arnold for plaintiff in error.

J. C. Kiskaddon for defendant in error.

An administrator's deed is made by the statute *prima facie* evidence of the facts therein stated. W. S., page 98, Sec. 37; *Moore v. Wingate*, 53 Mo. 398. Then by this deed we ascertain that all the proceedings were regular, and were approved by the court, and that Scott acted as administrator *de facto*, although he might not be such *de jure*, and that the probate court recognized him in that capacity. Nor do the plaintiffs dispute his appointment, but only the jurisdiction of the court to make it. There is but one objection apparent upon the face of the deed, and that is that there were but two appraisers. But that is a mere irregularity which will not vitiate the defendant's title, if the court had jurisdiction. *Moore v. Wingate*, 53 Mo. 398. The only attack upon the jurisdiction of the court is, that the deceased was not domiciled at the time of his death in Crawford county. On this point see *Dequendre v. Williams*, 31 Ind. 444; *Grignon v. Astor*, 2 Howard 319; *Thompson v. Tolumi*, 2 Peters 165; *Sheldon v. Newton*, 3 Ohio St. 494. Probate courts are not courts of special or limited jurisdiction; they are not inferior courts in the technical sense of the term, because an appeal lies from their decision, but they are courts of record having an

original general jurisdiction over a particular subject. See cases already cited, and, *Schroyer v. Richmond*, 16 Ohio St. 455; *Parsley v. Hayes*, 22 Iowa 34. The proceedings of probate courts are *in rem*; all the world are parties. All that is required is jurisdiction of the subject matter. Cases already cited, and, *Satcher v. Satcher* 41 Ala. 26; *Perkins v. Fairfield*, 11 Mass. 227; *Robb v. Irwin*, 15 Ohio 689; *Benson v. Cilly*, 8 Ohio St. 604; *Barden v. State*, 6 Eng. (Ark.) 519. In a collateral proceeding other courts will not inquire whether or not the deceased was a resident of the county in which an administrator of his estate is appointed. *Wight v. Wallbaum*, 39 Ill. 554; *Fisher v. Bassett*, 9 Leigh 119.

Henry, J.—Plaintiffs brought ejectment against defendant for a tract of land situate in the county of Crawford, described as follows: "The northeast quarter of section thirty, township thirty-six, range four, west." Both parties admitted title in one Thomas J. Higginbotham, and it was agreed that plaintiffs are his heirs at law. Defendant claimed, under a deed from H. C. Scott, the administrator of the estate of said Higginbotham, made on a sale of said land, under and in pursuance of an order of the probate court of Crawford county of the December term, 1866. The land was sold by said administrator on the 19th day of March, 1867. At the next term of said court, June, 1867, the administrator's report of said sale was approved by the court, and on the 12th day of June, 1867, he executed a deed for the premises to defendant. To the admission of this deed in evidence plaintiffs objected, on the ground that it did not appear by said deed "that the probate court of Crawford county had jurisdiction of the estate of said Higginbotham, or that said court had authority to appoint H. C. Scott to take charge of the same; that it appeared by said deed that the land was appraised by only two householders; that there was no evidence of the appointment of Scott as administrator of said estate." These objec-

tions were overruled, and the deed was read, as evidence, to the jury; and this was all the evidence offered by defendant. Plaintiffs then offered to prove, by competent witnesses, that at the time of his death, said Higginbotham resided in the county of Dent, and that he never resided in Crawford county. This was objected to by defendant and excluded by the court. But inasmuch as, in their testimony in chief, plaintiffs had been permitted, without objection, to prove the same fact, we shall take it for granted that Higginbotham did, at his death, reside in Dent county. There was a judgment for defendant, and plaintiffs have brought the cause to this court by writ of error.

The three alleged errors are: that it does not appear that the probate court of Crawford county had jurisdiction of the estate of Higginbotham, or that the court had authority to appoint Scott administrator of his estate, that it appeared by the deed that the land was appraised by only two householders; that there was no evidence that Scott had ever been appointed administrator.

The second point made by plaintiffs was decided by this court in *Moore v. Wingate*, 55 Mo. 398. Section 6, Wagner's Statutes, 2d Vol. p. 887 provides that "words imparting joint authority to three or more persons, shall be construed as authority to a majority of such persons, unless otherwise declared in the law giving such authority." In *Moore v. Wingate*, it was held that a certificate of appraisement signed by two of the appraisers was sufficient.

1. AN ADMINISTRATOR'S DEED.

With regard to the third point, Sec. 35, Wag. Stat., 1 Vol. 98, provides that "if such report (report of sale) be approved by the court, such sale shall be valid, and the executor or administrator, or if he be the purchaser, the clerk of the court shall execute and deliver to the purchaser a deed referring, in apt and appropriate terms, to the order of sale, and the court by which it was made, the certificate of appraisement, the advertisement,

2. —: recital.

the time and place of sale, the report of the proceedings, and order of approval thereof by the court, and the consideration and conveying to the purchaser all the right, title and interest which the deceased had in the same." Sec. 37, same page, provides that "such deed shall convey the decedent's title, and be evidence of the facts therein recited." The deed to defendant, it will be observed, contains all the recitals required by the statute. It recites, that on the 8th day of December, 1866, by a proper order of record, *H. C. Scott, as administrator* of the estate of Thos. J. Higginbotham, was ordered to sell the real estate in controversy. In the acknowledgment of the deed in open court by the administrator, said Scott is again mentioned as the *administrator of said estate.* As the statute makes the deed evidence of such facts as are required to be recited in the deed, no other proof than the deed itself was necessary to establish, in the first place, that said Scott was administrator of said estate.

3. PROBATE COURT JUDGMENTS: jurisdiction, wills and administration.

The remaining question is one of considerable difficulty. Some of the ablest courts in the United States have held the doctrine contended for by the plaintiffs in error, while others, of equal ability, have ruled otherwise. The decisions of our own court are not in entire harmony with each other, and in several of our sister States the same vacillation will be observed in the adjudications on this subject. In this perplexing conflict of authority, we can but weigh the authorities and arguments, and incline, as in our judgment, they preponderate.

The 12th section of article 5 of the constitution of this State, in force when the probate court of Crawford county was established, was as follows: "Inferior tribunals shall be established in each county for the transaction of all county business, for appointing guardians, for granting letters testamentary and of administration, and for settling the accounts of executors, administrators and guardians." By the act of the General Assembly creating this court,

(Sess. Acts 1855, page 499,) exclusive original jurisdiction was conferred upon it, in all cases relative to the probate of last wills and testaments, granting letters testamentary and of administration, settling and allowing accounts of executors and administrators, and determining all disputes and controversies whatever, respecting wills and the right of executorship and administration. By the 5th section, it was made a court of record, and true and faithful records of its proceedings were required to be kept. By section 3, article 1 of the administration law, it is provided that "letters testamentary and of administration shall be granted in the county in which the mansion or place of abode of the deceased is situated. If he had no mansion house and be possessed of lands, letters shall be granted in the county in which the land or the greater part therof lies, etc." The assumption upon which is based all the argument for holding the record as a nullity is, that the county and probate courts of this State are of inferior and limited jurisdiction, although expressly made courts of record by the statute, with exclusive original jurisdiction over the subjects committed to them, and although the constitution of the State provided for their creation, and, in general terms, defined the jurisdiction that was to be conferred upon them. It is unnecessary to refer to cases decided by this or other courts, in regard to special jurisdiction confided by statute to justices of the peace or to circuit courts, wherein those courts had no jurisdiction of the subject, except as conferred and restricted by the statute. In such cases it is well settled in this State, that the jurisdiction of the court must appear in the record, and that, if it do not so appear, the judgment may be attacked in collateral proceedings. The case of *Lacey v. Williams*, 27 Mo. 280, was one in which a guardian was appointed for an infant not residing in the county where the appointment was made, but owning land therein, and it was a direct proceeding to remove the guardian so appointed. It is clear that in that case the court had no such power as it exercised, but the

main question in this was not raised in that case, and it is no authority for the position here taken by the plaintiffs in error. It is not intimated in the opinion of the court that the action of a probate court upon a subject-matter confided to it, occupies any different position from that of the circuit court upon a subject-matter over which it has general jurisdiction. That the probate court of Crawford county, in the case we are considering, erred in the appointment of an administrator of the estate of Higginbotham, who resided and had his mansion in the county of Dent, although he owned land in the county of Crawford, is clear; but the appointment having been made, the presumption is, that the matter has been considered and determined by the court, and until the contrary appears in a direct proceeding in that court, or some higher court to which an appeal lies, the record of the appointment will be conclusive, in all collateral proceedings. The jurisdiction of probate courts is not, like that of justices of the peace, confined to special cases in which the jurisdiction must appear, but their jurisdiction pertaining to wills and administrators is general. The subjects of their jurisdiction are clearly defined, and any action of theirs outside of such subjects, would be of no force or validity, and the same may be said of the circuit court; but their action, on subjects exclusively and originally confided to them, is entitled to the same weight as that of any other court of record.

4. ADMINISTRATOR'S DEED: Jurisdiction.

It is insisted that the appointment of H. C. Scott as administrator of Higginbotham's estate is to be treated as a nullity, because there is no record showing the fact that the deceased resided at the date of his death in Crawford county, in other words, that the record must show facts which authorized the action of the probate court: not merely that an administrator was appointed, but that all the requirements of the statute had been duly complied with. The statute provides that if the deceased had no mansion house, or place of abode at the

time of his death, but owned land, letters should be granted in the county in which the greater part of the land lies: and the argument made here would be equally good in the case of an appointment of an administrator of one deceased who had no domicil, if the record did not expressly show that the greater part of the lands were in the county in which the appointment was made—and yet this would not be seriously insisted upon. In the case at bar, if the position taken by the plaintiffs in error is correct, it was wholly unnecessary to prove that Higginbotham resided, and had his mansion house in Dent county; for the argument is that, unless the record shows, either that the deceased resided and had his mansion house in Crawford county, or had no residence or mansion house, but owned lands, and that the greater part of said lands were in Crawford county, the appointment is to be treated as a nullity. The case of *Schell v. Leland*, 45 Mo. 294, is not an authority for the doctrine contended for by plaintiffs in error. The Kansas City Court of Common Pleas was, by the terms of the act creating it, expressly limited on the subject matter of mechanics' liens to the township in which it was located, and it was held, that when in that court a lien was attempted to be enforced, the record must show that the property against which the lien was sought to be enforced, was in Kaw township. It was a local court, confined in its jurisdiction to Kaw township, an inconsiderable portion, geographically, of the county of Jackson. Such a court is not to be treated as occupying the same position as probate courts, which, by the statute, "have exclusive original jurisdiction in all cases relative to the probate of last wills and testaments, the granting letters testamentary and of administration, &c." and whose jurisdiction is coextensive with the respective counties for which they are created. The case of *Bryan v. Mundy*, 14 Mo. 459, originated on a motion in the probate court, two years after a demand was allowed and classified by that court, to set it aside, on the ground that the administrator

had no notice that such demand would be presented for allowance. The record did not show that he had notice and there was evidence tending to show that, in fact, he had no notice. That, it will be perceived, was a direct proceeding to set aside the judgment, between the original parties to the suit, no rights of third persons intervening; and although the doctrine of that case, as Judge Sherwood observed in *Brooks v. Duckworth's adm'r*, "has been very often doubted," yet, admitting it to be correct, it comes far short of sustaining the doctrine here insisted upon. A careful analysis of the case of *Valle v. Fleming*, 19 Mo. 454, we think, will show that it does not conflict with the doctrine we have endeavored to maintain. Judge Scott says, in that case, "that the county courts have no other jurisdiction than that which is specifically conferred on them by statute. They have no common law jurisdiction, nor can they be said to be courts of general jurisdiction, in whose favor, by the common law, the liberal intendments are indulged, which are extended to courts of that character. But the great mischief which, experience has shown, arises from avoiding sales made under the authority of tribunals having jurisdiction of the subject, have induced courts to extend an enlarged liberality of construction to proceedings instituted for such purpose, with a view to uphold them. As to these proceedings, the presumption extended to courts of general jurisdiction is indulged." In that case the record affirmatively showed that no notice had been given, and Judge Scott says, "How then can a notice be presumed, when the record on its face shows that it was impossible in the nature of things, that it could have been given." The same distinguished judge said, in *Riley's adm'r v. McCord's adm'r*, 24 Mo. 267, "an illegality in the grant of letters of administration cannot be taken advantage of in a collateral proceeding. They must be regarded as valid until they are regularly revoked." In *Strouse v. Drennan*, 41 Mo. 289, this court held a different doctrine. It is there said that "our county and probate

courts are not courts of general jurisdiction, according to the common law meaning of the term, in which such liberal intendments are indulged, for they have only limited jurisdiction which is especially conferred on them by statute." To the same effect is *Gibson v. Vaughn, adm'r, &c.*, 61 Mo. 418. We think, after a careful review of the authorities, that those are not in harmony with the best considered cases in this country, and should be overruled. The case of *Brooks v. Duckworth*, 59 Mo. 49 is an express decision of this court on the point under consideration. It was there held, that on a presentation of a demand to the county court for allowance against an estate, the jurisdiction of that court to pass on its validity at once arose, and the conclusion of the court upon the evidence, and all other matters to be adjudicated, could not be attacked collaterally.

In *Kemp's Lessee v. Kennedy*, 5 Cranch 173, Ch. J. Marshall said, "all courts from which an appeal lies, are inferior courts, in relation to the appellate court, before which their judgment may be carried, but they are not therefore inferior courts in the technical sense of those words. They apply to courts of special and limited jurisdiction, which are erected on such principles, that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities." In *Griffith v. Frazier*, 8 Cranch 9, Ch. J. Marshall observed: "To give the Ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the Ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent

authorities, because he had power to grant letters of administration in the case." To the same effect is the case of *McNitt v. Turner*, 16 Wallace 353. A statute of Illinois provided that "in all cases where the intestate shall have been a non-resident, or without a widow, next of kin, or creditors in this State, but having property within the State, administration shall be granted to the public administrator of the proper county, and to no other person." The probate justice of Adams county appointed Archibald Williams administrator of the estate of Samuel Spotts deceased, and, as such administrator, he applied to the circuit court of said county, and procured an order to sell certain tracts of land of which said Spotts died seized. The proceedings of the probate court did not show that Williams was public administrator, nor did they show that there was no such officer in the county at the time. Justice Swayne, delivering the opinion of the court, said: "It does not appear that Williams was not the public administrator, and, if he were not, that there was any such officer for Adams county at that time. If there was not, the appointment of Williams was proper. Error must be shown. It is not to be inferred, except where the inference is inevitable. Everything consistent with the record, which would have warranted the appointment, will be presumed to have existed, and to have been found and acted upon by the court. Acts done which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter." To the same effect are the cases of *Grignon v. Astor*, 2 Howard 318; *Kennedy et al. v. Georgia St. Bank*, 8 Howard 586, and *McCormick v. Sullivant*, 10 Wheat. 199.

Propst v. Meadows, 13 Ill. 157, was the case of an allowance of a demand against an estate, which it was sought to avoid on the ground that the executor had no notice of the proceeding. Caton, Judge, delivering the opinion of the court, said: "Considering, as we do, that this judgment was not conclusive upon the executor, for want of

notice to appear and defend, the question arises, in what way he may obtain relief against the effects of the adjudication. We are not now prepared to say that this judgment was an absolute nullity from the omission of the record to show a notice to the executor. The county court, although of limited, is not, strictly speaking, of inferior, and certainly is not a court of special jurisdiction. It is a court of record, and has a general jurisdiction of unlimited extent over a particular class of subjects, and when acting within that sphere, its jurisdiction is as general as that of the circuit court. When, therefore, it is adjudicating upon the administration of estates, over which it has a general jurisdiction, as liberal intendments will be granted in its favor as would be extended to the proceedings of the circuit court; and it is not necessary that all the facts and circumstances which justify its action should affirmatively appear upon the face of its proceedings." In *Wight v. Wallbaum*, 39 Ill. 563, it was held that "where a court has jurisdiction of the subject-matter and of the parties, its judgment must be held conclusive, in all cases, except in a direct proceeding for its reversal." That was a case in which it was urged that the failure of the probate court to observe the requirements of the law, in granting letters of administration with the will annexed, rendered the appointment void.

The case of *Cutts v. Hoskins*, 9 Mass. 543, very similar in its facts to the case at bar, and in which it was held that a grant of letters by the probate court of one county, when intestate had died in another, which was prohibited by their statute, was a nullity and might be attacked in a collateral proceeding, was reviewed and its doctrine condemned by the learned judge who delivered the opinion of the court in *Wight v. Wallbaum, supra*. *Schroyer v. Richmond & Staley*, 16 Ohio St. 455, and *Dequendre v. Williams*, 31 Ind. 445, fully sustain the views expressed by Walker, Judge, in *Wight v. Wallbaum*. In *Schroyer v. Richmond*, Scott, C. J., observes, "whilst the statute requires the

record to contain 'an entry of the appointment' of all guardians, it nowhere requires that the record shall show the existence of a state of facts such as to warrant the exercise of its authority, or the evidence upon which the court relied, in making the appointment. Nor does any rule of law require this of such a court. True, it is a court of limited jurisdiction, and it is equally true that the jurisdiction of each of the courts of the State is expressly limited, either by the constitution or by statute. But as was said in the case of *Sheldon v. Newton* (3 Ohio St. 500), "the distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it to a final judgment, without setting forth the facts and evidence on which it is rendered, and whose records, when made import absolute verity, and those of an inferior grade, whose decisions are not of themselves evidence, and whose judgment can be looked through for the facts and evidence necessary to sustain them." *Kimball v. Fisk*, 39 N. H. 110, is in harmony with the cases in Ohio, Indiana, Illinois and the Supreme Court of the U. S. The distinction is not between courts whose proceedings are, and courts whose proceedings are not, according to the course of the common law; but between courts of record which have, and, in the particular case, exercise their general original jurisdiction, and courts not of record—courts of record, which have a limited and special jurisdiction, and courts of record having original general jurisdiction, but which, in the particular case, exercise a limited jurisdiction, not within the scope of their general jurisdiction.

In a note to *Roderigas v. East River Savings Institution*, reported in the American Law Register, Vol. 5, No. 4, 213, Judge Redfield says: "There is no very good reason why the jurisdiction of courts of probate, so far as it depends upon domicile within a particular district within the State, should be allowed to be attacked collaterally, and all the

proceedings rendered nugatory. But the decisions to this extent are very numerous, and have never been questioned, to our knowledge." Again, he says: "There is no controversy, we believe, or has been none heretofore, that courts of probate, whose jurisdiction is created and defined by statute for the settlement of estates, within particular defined districts, must be regarded both as inferior courts, and of special and limited jurisdiction, and that no presumption could be made in favor of their jurisdiction beyond what appears on the face of their proceedings, and that even where that appeared regular, it might be contradicted in any collateral proceeding, and the whole action of the court rendered nugatory and void for all purposes." If we comprehend the statement of this eminent author, it strikes us as most remarkable, in the face of the numerous decisions we have cited, from Ohio, Indiana, Illinois, New Hampshire, the Supreme Court of the United States, and to which we now add *Fisher v. Basset*, 9 Leigh. 119; *Den ex. Dem. Obert v. Hammel*, 18 N. J. L. 75, and *Hahn v. Kelley*, 34 Cal. 391. In nearly all of these cases, it was expressly held that the judgment of a court of record having general jurisdiction over administrations, &c., could not be attacked in collateral proceedings, and for more than a half century there has not only been a *controversy* on the subject mentioned by Judge Redfield, but the weight of authority overwhelmingly sustains the views we have herein expressed, and which are so ably maintained in the cases to which we have referred. *Langworthy v. Baker*, 23 Ill. 484, cited by Judge Redfield, does not sustain his position. It was a direct and not a collateral proceeding. It was a writ of error prosecuted for the express purpose of having the judgment of the probate court reversed by the Supreme Court, and BREESE, J., who delivered the opinion of the court, cites approvingly *Propst v. Meadows*, *supra*. In the case of *Roderigas v. East River Savings Inst.*, the court of appeals of New York held that the appointment, by a probate court, of an administrator of the estate of one not dead,

could not be attacked collaterally; and it is probably true, as Judge Redfield remarks, "that that decision is without a precedent, either in English or American jurisprudence." By its judgment in that case, the probate court, of course without notice to the living man, declared him dead, and invested another with title to his property. No man in New York or elsewhere in the United States can be deprived of his property, except by due process of law, and it would be strange indeed, if, in such a case as Roderigas', the supposed deceased could not, against the whole world, assert his rights against such a judgment, either directly or collaterally. Probate courts have no jurisdiction conferred upon them over the estates of living men. An order appointing an administrator of the estate of a living man would have the effect, if valid, of taking the property of one man, without his consent, and vesting it in another. Not so of the appointment of one as administrator, not entitled, against another, who has by law, the right to administer. The latter has no right of property that would be divested, and the condition of things exists, in regard to that estate, which awakes the jurisdiction of the probate court then, and only then, becoming possessed of power and authority to exercise its general jurisdiction in the particular case. *Griffith v. Frazier*, 8 Cranch 9.

5. ADMINISTRATOR'S APPOINTMENT.

When Higginbotham died, it became necessary to appoint an administrator of his estate. The probate court had to determine several questions of fact before making the appointment; among them, that Higginbotham was dead, that he resided and had a mansion house in the county where the court was asked to make the appointment, or that, when he died, he had no place of abode or mansion house, that he owned land in that county, and that it was the greater part of his land. Having a general jurisdiction over the subject-matter, and the law requiring the court to pass upon those questions, before granting letters of administration on his estate, it is to be exclusively presumed, in a collateral pro-

ceeding, that the court not only did so, but that it correctly passed upon them. To allow the heirs, or any one else, in a collateral proceeding to question the correctness of the judgment of the court, would so imperil the titles conveyed at administrator's sales of lands that no prudent man would bid their value, and estates would be sacrificed. Both public policy and the weight of authority sustain the title which defendant acquired by his purchase at the administrator's sale, and as the instructions which the court gave the jury are in harmony with these views, and those asked by plaintiffs and refused, asserted the contrary doctrine, the judgment is affirmed. All concur except HOUGH, J., who concurs in the result

AFFIRMED.

HERNDON ET AL., APPELLANTS v. HAWKINS ET AL.

County Seat, Destruction of: JUDGMENT RENDERED AT TEMPORARY SEAT. If it appears by the record of a judgment that the court, which pronounced it, had jurisdiction of the person of the defendant, and of the subject-matter of the suit, such judgment will not, in a collateral proceeding, be held void upon proof being made that it was rendered at a place other than the established seat of justice of the county, when it is shown that all the houses at the latter place had, before the rendition of the judgment, been destroyed by fire, and that the county court had accepted, as a temporary seat of justice, the place at which the judgment was rendered.

Appeal from Ozark Circuit Court.—HON. J. B. WOODSIDE, Judge.

E. Y. Mitchell for appellants.

The court erred in excluding the deed from the sheriff to Sherwood and Julian. There was no house at the county seat when the judgment was rendered. The county court had ordered the sheriff to select a suitable place for holding the courts, until buildings could be erected at the

county seat. The sheriff swore that, in obedience to this order, he selected the place, and reported the same to the county court, and the judgment was rendered at that place. The record also shows that the court, at which the judgment was rendered, had been regularly adjourned from the county seat to the place where it was rendered. The court having passed on the matters in issue, when the judgment was rendered, the same cannot be attacked collaterally. *Kane v. McCown*, 55 Mo. 181; *Bouldin v. Ewart*, 63 Mo. 330. The county court having ordered the sheriff to provide a place for holding court, it will be presumed that that court properly exercised the authority conferred by law, see Gen. Stat. 224, § 36. None but the most cogent reasons should induce this court to depart from that conservative principle, which the most eminent jurists have ever observed, when the jurisdiction of tribunals possessed of every appearance of authority and clothed with every semblance and insignia of power, is collaterally called in question. *State v. Douglass*, 50 Mo. 593. When a want of jurisdiction actually exists in a domestic tribunal of general jurisdiction, and is not apparent upon the record, the appropriate mode of ascertaining it is by writ of error, and, until it is so ascertained, the judgment imports absolute verity. *Granger v. Clark*, 22 Me. 128. See also, *Galpin v. Page*, 18 Wall. 350; *Hahn v. Kelly*, 34 Cal. 392; *Huxley v. Harrold*, 62 Mo. 516; *Hunter v. Ferguson*, 13 Kans. 462.

Waddill & Crandell for respondents.

The judgment recited in the deed offered in evidence by appellants, was rendered at a place unknown to the law, and different from that fixed by law, viz: "Both the circuit and county courts in the several counties in this State shall be held at the county seat of each respective county." Laws 1866, p. 83, § 1.

Norton, J.—This is an ejectment suit instituted in the

circuit court of Ozark county against the defendants, as the heirs of S. H. Hawkins, for the recovery of the possession of certain lands described in the petition. The answer of defendant denies the right of plaintiffs to the possession of said lands, and alleges that the sheriff's deed under which plaintiffs claim, was a false and fraudulent deed; that the judgment and execution against one Crawford Brixley, under which said land was sold, was a false, fraudulent and void judgment; that the order of publication issued and published, required said Crawford Brixley to appear before the circuit court of Ozark county on the 4th Monday in February, 1865, at the court house in Gainsville, the county seat of said county; that there was no term of the circuit court to be held at Gainsville at that time, as plaintiffs well knew; that on the 31st day of August, 1865, at a term of the court held at Spring Creek school house, in Ozark county, an interlocutory judgment was entered against said Brixley, and, at a subsequent term of said court, held at the house of S. I. Forest, in said county, the plaintiff, Herndon, fraudulently obtained and entered upon the records of said court a final judgment against said Crawford Brixley for the sum of ten thousand dollars; that upon this judgment a special execution was issued, and the lands sued for were sold, and plaintiffs purchased the same for the sum of $30, and received a sheriff's deed; that one S. H. Hawkins, the ancestor of defendants, bought, in his life time of said Brixley, all the lands in dispute, and received a deed for the same; that said Brixley had a perfect title to said lands, and prays the court to declare the sheriff's deed, and the proceedings on which it is based, null and void.

The allegations of the answer were denied by replication, and upon a trial of the same, the court having refused to admit in evidence the sheriff's deed to plaintiffs for said lands, they took a non-suit with leave to move to set the same aside. An unsuccessful motion was in due time made to set aside the judgment of non-suit and grant

a new trial, and the cause is brought to this court on appeal. The chief error complained of is as to the action of the court in refusing to admit the sheriff's deed offered by plaintiffs in evidence. The history of the case, as shown by the record, discloses the following facts: In September, 1864, S. C. Herndon instituted his suit by attachment against one Crawford Brixley, upon which was issued a writ of attachment, including a clause summoning the defendant to appear and answer the action at the next term of the circuit court of Ozark county, to be held in Gainsville, on the 4th Monday in February, 1865. Upon the affidavit of plaintiff that the defendant had absented himself from his usual place of abode in this State, an order of publication was made and published in the Springfield *Journal*, notifying defendant of the pendency of the suit and the character of it, and also notifying him to appear at the next term of the circuit court to be held in Gainsville on the 4th Monday in February, 1865. This term of court appears not to have been held, as the record seems to be silent in regard to it. The regular August term, 1865 was, upon the order of ——— Boyd, Circuit Judge, adjourned by proclamation made by the sheriff on the first day of said August term from Gainsville, which was the county seat, to Spring Creek school house. At this latter place an interlocutory judgment was rendered at that time against the defendant Brixley, and the cause continued. On the 6th day of October, 1866, R. W. Fyan, Judge, ordered the sheriff by proclamation to adjourn the circuit court of said county from the third Monday in October, 1866, to the second Monday in December, 1866, and on the second Monday of December, 1866, said court was, by his order, adjourned from Gainsville to meet on the same day at the house of S. I. Forrest. On the eighth day of October, 1866, the county court of said county ordered and directed the sheriff of said county to select and rent a house for the purpose of holding the courts of the county in, as near as practicable to the county seat, there being no house in

Gainsville, the county seat, where the court could be held, all the houses in said town having been burned or destroyed during the war. In obedience to this order the said sheriff selected the house of S. I. Forrest as the most suitable and convenient place, and during the October adjourned term, 1866, held at the latter place on the second Monday in December, 1866, the final judgment was rendered, upon which an execution subsequently issued, under which the lands in controversy were sold at the court house door, at the October term, 1867 of said court. It is insisted by defendants that, inasmuch as it is shown by the record that the circuit court of Ozark county, where the judgment was rendered, was not held at Gainsville, the county seat designated by law as the place for holding it, but was held at the house of S. I. Forrest, fourteen miles distant therefrom, the judgment so rendered is void. The correctness of the genéral proposition that when the record affirmatively shows that a judgment in a cause was pronounced at a time and place where the law did not authorize the holding of court, such judgment will be held to be a nullity, is unquestioned. There is no dispute in this case as to the power of the judge under the law to hold the court at the time it was held, but his power to hold it at the place where it was held is denied. The question is not free from doubt and difficulty, and has not before been directly presented to this court, nor is such a case as the facts before us disclose expressly provided for by statute. It is provided in Chap. 40 Wag. Stat. 394 that, when a new county is organized, as soon as convenient buildings can be had, or a court house and jail are erected at the established seat of justice, the courts of such county shall be held at such seat of justice; and until such convenient building can be had, or a court house and jail erected, such court shall be held at such places as the county tribunal transacting county business shall determine. When such tribunal determines the places at which such courts shall be held, and causes proclamation to be made at the court

house door, that the courts thereafter will be held at such place, and if the place so selected shall not be the established seat of justice, the courts to be held in such county shall as soon as the court house and jail are erected, or sooner, if the tribunal transacting county business shall deem it expedient, be removed to and thereafter held at such established seat of justice. It is also provided in Art. 2 Chap. 40 Wag. Stat. 402, that when the seat of justice of any county shall be removed "as soon as convenient buildings for the holding of courts, together with a good and sufficient jail, can be had at such new seat of justice, the county court shall notify the judges of the several courts holden in the county at the next term thereof, who shall cause the sheriff to make proclamation at the court house door, in term time, that such courts will thereafter be held at the place so selected." It is manifest from the above provisions of the law that, as a condition precedent to the holding of courts at the seat of justice of a county, some place to hold them in must be provided by the county tribunal charged with that duty, and that, until such provision is made, the courts might legally be held at any other place or places in the county designated by the county tribunal. But it is said that the case at bar does not arise under the statute relating to the organization of new counties, nor to the removal of seats of justice, and is, therefore, not embraced within their provisions. While it is true, the case we are considering is not embraced within the letter of the act, it is by the spirit of it, that spirit being to authorize the county tribunals to provide a place other than the seat of justice until suitable buildings or a court house and jail can be provided, in which the courts can or may be held. The law does not require impossibilities. It imposed the duty on the judge of the circuit, which included Ozark, to hold his courts in that county at stated terms. This duty could not be performed by holding his courts in Gainsville, the seat of justice, because there was neither court house nor any other house

in that town in which they could be held. It does not appear, except inferentially, that a court house had ever been erected in Gainsville, and the presumption might well be indulged, from the action of the county court in October, 1866, in ordering a suitable place to be selected and rented as near the county seat as practicable, in which to hold the courts of the county, that no court house had been provided or erected. The record shows that the county court did act in this matter, and directed the place to be selected by the sheriff in which to hold the courts of the county; that the place selected by him was approved by the court; and that the court, at which the judgment in question was rendered, was held at the place thus selected and approved. To hold that a judgment rendered at such terms was absolutely void would be to reverse the rule of presumption, and presume that jurisdiction of the person and subject matter having been acquired, everything was irregularly, instead of regularly, transacted. In the case of *Bouldin v. Ewart*, 63 Mo. 330, which involved the validity of a sale made by the sheriff at the court house door in Georgetown after the passage of an act of the legislature removing the seat of justice to Sedalia, Judge HOUGH, in delivering the opinion, observed: "If, in some litigated cause the jurisdiction of the court to hear and determine causes at Georgetown, had been questioned in consequence of this act, and the court had adjudicated that its session was properly held there, could such determination be attacked collaterally? We think not. In our opinion the proceedings and judgments of the court at its session in Georgetown, have precisely the same validity and force which they would have had, if the right had been formally and solemnly determined. The very fact of holding the court there necessarily implied a judicial assertion of the right to hold it. It was a *de facto* court, and its proceedings were not void, even should it be conceded that its session was at a place unauthorized by law." The objections urged by defendant to the admissibility of the deed in evidence only

go to irregularities and not the validity of the proceedings on which it is based, and should therefore have been overruled. Judgment reversed and cause remanded, the other Judges concurring, except SHERWOOD, C. J., who did not sit, being a party to the suit.

REVERSED.

THORNTON, APPELLANT v. THOMAS ET AL.

Circuit Clerk: FEES. Section 24 of Article 6 of the Constitution of 1865, declared that "no clerk of any court * * * shall apply to to his own use from the fees and emoluments of his office, a greater sum than $2,500 for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office, as the court may deem necessary and may allow; but all surplus of such fees and emoluments over that sum, after paying the amounts so allowed, shall be paid into the county treasury for the use of the county." Under this section, *Held*, that the clerk of a circuit court received and held the fees of his office in trust: 1st, to pay his deputies; 2d, to pay himself a sum not exceeding $2,500 per annum; 3d, to turn the residue into the county treasury. After receiving the amount allowed for his compensation, he had no further interest in the fees, and if he went out of office leaving uncollected fees which he had earned, his successor in office, and not he, was entitled to collect them.

Appeal from St. Louis Court of Appeals.

George A. Madill for appellant.

1. Section 24 of Art. 6 of the constitution of 1865, and the acts passed to carry it into effect, (Wag. Stat. 631, § 29 *et seq.*, Sess. Acts 1874, p. 63,) in effect make the clerk a trustee, and he receives the fees and emoluments of his office in trust to pay: *first*, such amounts as the court may direct to deputies; *second*, to pay the clerk a sum not exceeding $2,500; *and, third*, to turn over, as the property of the county, any balance left after these payments are made. The clerk consequently has no absolute or unqualified

property in any of the fees earned. His right to a dollar of them depends upon the *amount* of the fees and the *amount* of compensation directed by the court to be paid to deputies. And certainly as soon as the fact is ascertained that the amount to be disbursed is equal to, or exceeds, the amount of fees earned, then the clerk has not even a qualified or contingent property right in the fees as such. And also the moment it is ascertained that the fees are sufficient to meet the ordered disbursements, and allow the clerk the full sum which in any possible event he may appropriate to his own use, and he has in fact received or appropriated this amount to his own use, then every dollar remaining in his possession, or uncollected, belongs absolutely to the county. As to fees already collected, the clerk is simply a trustee with no power to deal with them for any purpose, except that of preserving and paying them over to the county treasurer, and as to those fees which remain uncollected, the clerk has no property in them, but they are absolutely, as between him and the county, the property of the county. Lewis, therefore, has no right to any fees collected since his settlement on the 4th day of January, 1875, though earned previously.

2. The foregoing provisions of the constitution and laws confer the right and impose the duty upon Thornton, as the incumbent of the office, to collect the fees earned, without reference to the question whether they were earned during his own term or that of his predecessor. *In re Lewis*, 52 Mo. 550.

3. Under the provision of the constitution and statutes cited, the clerk of the circuit court, as regards the fees and emoluments of the office, as well as in respect of some other rights and duties of the office, is to be treated as a *quasi* sole corporation. Individuals or officers clothed with rights or powers which are incidents only of corporations, are, as to such rights or powers, deemed either corporations aggregate, or sole, or *quasi* corporations, as the case may be. Accepting this view, Thornton's right to col-

lect these fees at once follows. Angell & Ames on Corp. 9 ed., p. 16, Sec. 23, *et seq.* *Yanson v. Ostrander*, 1 Cowen 670.

Samuel Reber for respondent Lewis.

Thornton is not entitled to collect the fees earned by his predecessor in office, because he neither has a property in them nor an authority by law to receive or collect them. Before the adoption of the constitution of 1865, the clerk had the right to collect all fees earned by him, because they were his property, and this right remains unchanged except that Sec. 24, Art. 6, forbids him to apply to his own use more than a specified portion; all in excess of that portion is to be paid into the county treasury, and the General Assembly is required to pass laws to carry that section into effect. The General Assembly might have authorized the successor to collect (and pay into the county treasury) the surplus fees of his predecessor, but it has not done so.

NAPTON, J.—In this case there is the following agreed state of facts:

1st. That J. Fred. Thornton is now, and has been since the 4th day of January, A. D. 1875, the clerk of said circuit court of the county of St. Louis, Missouri; that said Emile Thomas is the sheriff of said county, and said John Lewis was formerly the clerk of said circuit court for the official term immediately preceding the term of said Thornton, and until January 4, 1875, when he ceased to be, and said Thornton became such clerk.

2nd. That on said 4th day of January, A. D. 1875, the day on which he ceased to be such clerk, said John Lewis made and delivered to the judges of said circuit court his statement in detail, under oath, showing the aggregate amount of all official fees and emoluments received by him, as such clerk, during the year then last past, which was then examined by said court, and the same exceeded two thousand five hundred dollars, after deducting therefrom the sums and amounts for deputies and assistants and expenses as the said court deemed necessary and allowed, and

an order was then made by said court, and which said court caused to be certified to the county court of said county, requiring said Lewis, as such clerk, to pay the said surplus which remained in his hands (over and above the sum of twenty-five hundred dollars, and the amount so allowed by said court for deputies and assistants and expenses) into the county treasury of said county, within ten days thereafter. A true copy of said statement is herewith filed, and it is agreed that it is to be considered by the court as if embodied herein. The said sum of twenty-five hundred dollars, salary of said Lewis, and also the amounts allowed by said court, were deducted and retained by said Lewis, as such clerk, and the said surplus so to be paid into said treasury was more than four thousand dollars.

3rd. That in and for each year for and during the said late term of office of said Lewis, he received of official fees and emoluments of said office an excess of money over and above twenty-five hundred dollars, and the amounts allowed by said court for deputies, assistants and expenses, and so reported in his statements to said court each year, and paid a surplus each year into said county treasury.

4th. That on the 8th day of January, A. D. 1875, a fee bill was duly issued and certified by said Thornton, as such clerk, and directed to said sheriff, and placed in his hands to be enforced and collected, which was for the sum of forty-eight $\frac{20}{100}$ dollars. A copy of said fee bill is hereto annexed, and by agreement is made part hereof, and to be considered by the court as fully as if embodied herein. Said fee bill and the full amount embracing all the items therein was collected by said Thomas, as such sheriff.

5th. Said John Lewis claims and demands that the item and amount of eighteen dollars and fifty cents appearing in said fee bill as taxed in the name of said Lewis, clerk of said court, shall be paid to him as such former clerk, by said sheriff, and has so notified said sheriff, and said Thornton claims and demands that said amount shall be paid to him as such clerk, and has so notified said sheriff.

6th. Said item and amount of eighteen dollars and fifty cents was taxed as costs in the case of *Thomas A. Walker, executor of Isaac Walker v. George Beard and Eleazer Beard*, as mentioned in said fee bill, in the name of said Lewis, as such clerk, as fees in said cause for services rendered by said Lewis, as such clerk, during his said term of office.

7th. The said sum of eighteen dollars and fifty cents is still in the hands of said Thomas, as such sheriff, subject to be paid to the person entitled thereto.

Wherefore, the parties hereto pray for the judgment of this court, whether said Thomas, as such sheriff, is liable to pay said last named sum to said Lewis, or whether he is liable to pay the same to said Thornton; and it is agreed that if said sheriff is bound to pay the same to said Lewis, then judgment shall be rendered in favor of said Lewis and against said Thomas for the sum of eighteen dollars and fifty cents, and against said Thornton for the costs herein; but if said sheriff is bound or liable to pay the same to said Thornton, as such clerk, then judgment shall be rendered and entered herein in favor of said Thornton, against said Thomas for said sum of eighteen dollars and fifty cents, and against said Lewis for the costs herein; either party to have the right to appeal or to a writ of error.

The case was originally submitted to the circuit court in general term, and subsequently to the Court of Appeals, and now comes before this court. Although the facts in this case vary somewhat from the facts in the case of *In re Lewis*, (52 Mo. 550,) the principle involved in the two cases seems to be the same, and our conclusion is the same with the one reached by the court in that case. Since the adoption of the constitution of 1865, the mode of compensating clerks of courts in this State has been entirely changed from the system previously followed, and the officers may be considered as now having no interest whatever in the

fees. They receive as trustees for certain purposes enumerated, but only in that capacity. Fees are payable, not to A. or B. who happens to be clerk, but to the clerk, who may, without impropriety, as has been suggested in the argument of counsel, be termed a *quasi* corporation sole. In the present case Mr. Lewis has ceased to be clerk, and since his term of office has expired, excepting the duty of settlement with the court, a duty specifically provided for by statute, and which he has performed, he has had no further duties in connection with the office. He has settled with the court of which he was clerk, has retained sufficient of the fees received to pay himself and deputies, and handed over the remainder into the county treasury, as the law required him to do. What authority has he to receive fees now, no matter when or by whom earned? It is conceded he has no personal interest in them, he could only take them as a trustee for the county, and if Mr. Lewis is to be looked after for moneys properly belonging to the county treasury, his predecessor and the predecessor of his predecessor, must be followed till we get back to the date of the constitutional enactment. The securities of a clerk could, on this theory, hardly tell when their responsibility ceased, which seemingly ended with the final settlement of the clerk with the court, and his payment of the surplus fund into the county treasury.

The argument in opposition to this conclusion is based entirely on the assumption that the fees earned by a clerk belong to the clerk who earns them, as undoubtedly was formerly the law. The effect of the present system is to make the fees, whenever and by whomsoever earned, payable, when collected by the sheriff, to the clerk in office at the time of their collection, who holds them officially in trust for the purposes to which the law has destined them, whatever they may be. It is unnecessary to determine in this case whether one of these trusts would be to supply a deficiency in the receipts of a former year to cover expen-

ses and salaries, as no such case is presented by the facts. The judgment of the Court of Appeals is reversed and the judgment of the circuit court affirmed. Judges SHERWOOD, HOUGH and NORTON, concur; Judge WAGNER absent.*

AFFIRMED

*This case was decided at the October term, 1878.